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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., JACK ANDERSON, LILLIAN HELLMAN, ET AL.,
Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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This is an appeal from an order entered on January 7, 1976, by the United States District Court for the District of Columbia, denying the appellant's motions for preliminary and permanent injunctive relief and dismissing appellant's complaint which challenged the constitutionality of the Presidential Recordings and Materials Preservation Act, Pub. Law 93-526, 88 Stat. 1695, 44 U.S.C. § 2107 note, 3315-24. This statement is respectfully submitted to show that this Court has

jurisdiction over the appeal and that the serious constitutional questions presented warrant plenary review.

OPINION BELOW

The opinion of the three-judge district court is not yet reported. It is reprinted herein as Appendix A, pp. 1a-106a, *infra*.

JURISDICTION

This action was instituted pursuant to Section 105(a) of the Presidential Recordings and Materials Preservation Act, and pursuant to 28 U.S.C. §§ 1331, 1332, and 1346. A three-judge court was impaneled pursuant to 28 U.S.C. §§ 2282 and 2284. The order of the three-judge court (App. B., pp. 107a-108a, *infra*) was entered on January 7, 1976. A notice of appeal to this Court was filed on March 4, 1976 (App. C., p. 109a, *infra*). The jurisdiction of this Court to review the decision of the three-judge court rests upon 28 U.S.C. § 1253.

STATUTE INVOLVED

Sections 101-106 of the Presidential Recordings and Materials Preservation Act, Pub. Law 93-526, 88 Stat. 1695, 44 U.S.C. § 2107 note, 3315-24, are the subject of this appeal. The statute's text is reprinted in Appendix D, pp. 110a-116a, *infra*.

QUESTIONS PRESENTED

1. Whether the fundamental principle of separation of powers mandated by Articles I, II and III of the Constitution is violated by a legislative enactment that deprives a former President of any control over

the confidential papers and effects accumulated by him and his staff while in office and vests complete authority over such material in the Administrator of General Services pursuant to regulations to be approved by Congress.

2. Whether the provisions of the Presidential Recordings and Materials Preservation Act which authorize immediate access and review by the government, and potential access by the public generally to the confidential deliberations of a President after he has left office, without any preliminary showing of particularized need and merely for historical purposes, violate the constitutional privilege of confidentiality.

3. Whether appellant's constitutional right to privacy, protected by various provisions of the Bill of Rights, is violated by statutory seizure of *all* the papers and effects accumulated in his home and office during a five year period, and by government screening of every item and conversation seized, including intra-family communications and recordings of personal and political conversations.

4. Whether the First Amendment rights of appellant and his advisors in free speech and association are infringed by the governmental and potential public access to his materials granted by the Presidential Recordings and Materials Preservation Act.

5. Whether the Presidential Recordings and Materials Preservation Act constitutes a Bill of Attainder in violation of Article I, Section 9, Clause 3 of the Constitution in that it is a legislative enactment of "pains and penalties" aimed singly and specifically at the appellant.

6. Whether appellant has been denied equal protection of the laws, secured by the Due Process Clause of the Fifth Amendment, by a legislative enactment that "preserves" the "recordings and materials" of only his Presidency and subjects him to procedural and substantive obligations imposed upon no other President, past, present or future.

STATEMENT

Appellant served as President of the United States from January 20, 1969 to August 9, 1974. This case concerns the materials he and his personal staff accumulated in the White House during that period. Although it has been estimated that there are 42 million pages of documents within the scope of the Presidential Materials and Recordings Preservation Act, this case and the issues appellant raises principally concern that small percentage of material most intimately connected with appellant's personal and political activities while in office—including tape recordings of his conversations and some 200,000 other items personally prepared or reviewed by appellant. For the most part that material has always remained segregated from the bulk of the items seized by this Act and is presently stored in approximately four small areas in the White House complex. It is the seizure, review and potential publication of this material that present in clearest terms the issues raised by this appeal.

For the entire two centuries of this Nation's existence every President of the United States has had and has exercised sole and complete control over the disposition of the confidential materials accumulated by him and his staff while in office. On December 19,

1974, Congress departed from that unbroken tradition in order to deprive one particular former President of that right. It directed the General Services Administration ("GSA") to seize and review the entire record of Mr. Nixon's official, political and personal life from January 1969 through August, 1974. The enactment directed the GSA to make generally available all materials, including all recordings of confidential conversations, which might be deemed to constitute "Presidential historical materials." The constitutionality of that Act is presented for decision on this appeal.

A. History of Proceedings

In keeping with the practice of every prior President, appellant, upon leaving office, instructed his staff to arrange for the collection and transfer of his Presidential materials to California, where he anticipated they would be kept until the creation of a permanent repository established under the Presidential Libraries Act, 44 U.S.C. §§ 2101, 2107 *et seq.* The instructions given staff members concerning the assembly of these materials were the same as those given by William J. Hopkins, a career White House employee since the administration of Herbert Hoover, who directed the removal of President Kennedy's materials from the White House in the early days of the Johnson administration. As in the case of other mid-term transitions, staff members were to retain copies of any files needed for ongoing matters. The packaging and preparation of the materials proceeded in accordance with earlier tradition until halted because the Watergate Special Prosecutor stated that some of the materials "might be relevant" to pending investigations.

In order to clarify the matter of legal title to these materials, Counsel to President Ford requested an opinion from the Attorney General. A preliminary opinion, delivered by the Deputy Attorney General on August 29, 1974, and subsequently affirmed in a formal opinion by the Attorney General, advised the White House that appellant had title to these materials but that they were subject to judicial process.[1]

During the succeeding week, discussions were held between appellant's counsel and legal representatives of President Ford. As a result of these negotiations an agreement was concluded whereby appellant—confirming his long-standing intention to donate the majority of his Presidential materials, under appropriate access restrictions, to the United States for inclusion in a library—established an interim depository arrangement under which, for a period of three years (five years for recordings), no material could be removed and access could be gained only by joint action of appellant and the Administrator of General Services. The material was to be available at all times for production pursuant to lawful subpoenas or other compulsory process. A letter incorporating these terms was sent by appellant to the Administrator of GSA, who signed the agreement on September 7 after conferring with Counsel to the President.[2] When the government failed to implement the agreement, appellant instituted an action in the United States District Court for the District of Columbia seeking its

[1] The September 6, 1974 opinion of the Attorney General appears as Appendix E hereto, pp. 124a-133a, *infra*, 43 *Op. Att'y Gen.* 1.

[2] The agreement is reproduced as an appendix to *Nixon* v. *Sampson*, 389 F.Supp. 107, 160-162 (D.D.C. 1975), and is reproduced herein as Appendix F, pp. 134a-136a, *infra*.

specific performance. *Nixon* v. *Sampson*, D.D.C., C.A. No. 74-1518. Private plaintiffs thereafter instituted actions to set aside the agreement and to gain direct access to the materials, under, *inter alia*, the Freedom of Information Act. *Reporters Committee* v. *Sampson*, D.D.C., C.A. No. 74-1533; *Hellman* v. *Sampson*, D.D.C., C.A. No. 74-1551.[3]

On December 9, 1974, while various motions in the district court actions were pending, Congress enacted the legislation at issue here. It was signed by President Ford on December 19, and on the following day appellant filed this action, seeking declaratory and injunctive relief against enforcement of the Act on constitutional grounds, together with an application to convene a three-judge court pursuant to 28 U.S.C. §§ 2282, 2284. The district judge to whom the case was assigned failed to act on the three-judge court application, proceeding instead on an expedited basis with the consolidated cases to which he was assigned as a single judge, and in which the parties raised some of the same underlying issues presented in this case. A three-judge court finally was convened after action by the Court of Appeals on appellant's petition for a writ of mandamus. *Nixon* v. *Richey*, 513 F.2d 427, *motion for reconsideration granted*, 513 F.2d 430 (D.C. Cir. 1975).[4]

The three-judge court initially determined that it had jurisdiction under 28 U.S.C. § 2282 and granted

[3] These three actions have been referred to in this litigation as "the consolidated cases."

[4] The opinions of the Court of Appeals are reprinted as Appendices G and H, pp. 139a-202a *infra*. The judge to whom the case initially was assigned subsequently recused himself.

motions to intervene filed on behalf of the Watergate Special Prosecutor,[5] the Reporters Committee for Freedom of the Press, *et al.*, Lillian Hellman, *et al.*, and Jack Anderson (the latter three intervenors to proceed on a joint basis). The court deferred the motion for a preliminary injunction for consideration with the case on the merits,[6] and evidence was submitted by the parties consisting of affidavits, depositions, documentary exhibits and stipulations. The case was briefed and argued orally on September 24, 1975, and the court, in a 104-page opinion by Circuit Judge McGowan, denied the requested relief and dismissed the complaint on January 7, 1976. It also entered an injunction which bars, with certain exceptions, any access to the materials pending this appeal from its decision (pp. 107a-108a, *infra*).

B. Provisions of the Act

The Act provides, in Section 101, that "[n]otwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44 [the Presidential Libraries Act]," GSA shall "obtain, or retain, complete possession and control" of (1) all tape recordings involving Richard Nixon or any federal employee recorded in the White House or any other Presidential office from January 20, 1969, to

[5] The Special Prosecutor, declaring his interest in the Presidential materials to have been satisfied through procedures agreed upon between him and counsel for Mr. Nixon, subsequently moved for and was granted leave to withdraw as a party.

[6] All matters of custody and access to the Presidential materials were, during the pendency of this suit in the district court, controlled by orders entered in October and November, 1974, in the consolidated cases. The substance of these orders is described in the opinion of the district court (p. 16a, n. 10, *infra*).

August 9, 1974, and (2) "all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon . . ."[7] Section 102 of the Act bars destruction of any materials and directs that they be made available (1) for use in judicial proceedings, subject to any rights or privileges "which the Federal Government or any person may invoke," with requests by the Watergate Special Prosecution Force to have access priority over any other request; (2) to Richard Nixon, subject to regulations to be adopted by GSA;[8] and (3) to "[a]ny agency or department in the executive branch . . . for lawful Government use," subject to the same regulations.

The Act further provides, in Section 104, that the Administrator of General Services shall submit to Congress proposed regulations designed to "provide public access to the tape recordings and other materials referred to in section 101," taking into account seven "factors" including, first, "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate,'" and, last, "the need to give Richard M. Nixon, or his heirs, for his sole custody and use" those materials not likely to be related to Watergate *and* "not otherwise of general historical significance." These regulations may not be issued or changed at any time if

[7] The definition of "historical materials" is set forth in 44 U.S.C. § 2101, which covers every variety of paper or object having "historical or commemorative value."

[8] These regulations, adopted pursuant to Section 104 of the Act, are set forth at 41 C.F.R. §§ 105.63.101-.303.

the regulation or change is disapproved by a resolution of either House of Congress.[9]

Finally, the Act purports to give the United States District Court for the District of Columbia "exclusive jurisdiction" to entertain any challenge to the validity of the Act or any regulations issued thereunder and directs that, if any court should decide that the Act has deprived any individual of private property without just compensation, an amount adjudged by an appropriate court shall be paid from the Treasury (Section 105). Title II of the Act—not involved in this lawsuit—provides for the establishment of a commission to study matters relating to the control, disposition and preservation of the papers and effects of federal officials generally,[10] including the question "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted . . ." (Section 3317).

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[9] To date the Administrator has submitted three different sets of proposed regulations to Congress. The Senate disapproved the first set by resolution dated September 10, 1975. The Administrator contends that he withdrew the second set following the district court's January 7 decision, but committees of both the House and Senate state that the Administrator had no power to withdraw the proposed regulations. S. Rep. No. 94-748, 94th Cong., 1st Sess. (1976). The Senate disapproved various of the second set of proposed regulations by resolution dated April 8, 1976 (S. Res. 428). On April 13, 1976, the Administrator submitted a third set. All three sets of proposed regulations contain provisions which preclude them from becoming effective until the final disposition of this case.

[10] The commission's report to Congress setting forth recommendations for legislation dealing with the materials of all federal officials was to be submitted by March 31, 1976. That deadline has been extended to March 31, 1977 and the "judicial member," previously to be a Justice of this Court, is now to be a federal judge appointed by the Chief Justice. Pub. Law 94-261.

C. The Materials At Issue

The materials seized and retained by GSA pursuant to the Act include, aside from the tape recordings of thousands of Presidential conversations, an estimated 200,000 documents or other items produced by Mr. Nixon or to which he gave his personal attention while President. The variety of this collection precludes a detailed description here, but the following samples are illustrative of their content:

1. Diary dictabelt recordings by appellant expressing his reflections, thoughts, ideas and concerns at the end of the day's activities;
2. Briefing books prepared for appellant by his staff in preparation for speaking appearances at political gatherings;
3. Preliminary drafts—many in appellant's own handwriting—and supporting materials for major addresses such as the State of the Union message.
4. Advice and recommendations to appellant from staff members and others regarding the possible veto of legislation;
5. Presidential diaries and appointment books; and
6. Memoranda of appellant's meetings throughout the country with political leaders and local officials.

In addition, the materials given personal attention by the former President which have been seized by GSA include items relating solely to Mr. Nixon's personal life: correspondence and notes from friends and family members, mementos of his inauguration and

travels, tapes of conversations with his wife, children, physician, attorneys, personal friends, and so forth.

Aside from these materials, which are at the heart of this case, the "Presidential historical materials" include voluminous documents which by unvarying tradition have been the outgoing President's to dispose of as he pleases, but which do not so directly implicate the constitutional principles at issue in this case. These materials—which, for the most part, are presently stored in facilities in Suitland, Maryland—consist largely of bulk mail, reports and papers of which copies are also found in the files of government departments and agencies, copies of task force studies, and volumes of GPO publications.

Not included among the Presidential materials at issue here are records of agencies and independent establishments within the Executive Office of the President, such as the National Security Council's institutional files, the files of the Central Intelligence Agency, and the papers of the Office of Emergency Preparedness and Council of Economic Advisers. Also not included are personnel and other records maintained by the Administrative Office of the White House, original copies of official Presidential actions such as vetos, messages to Congress or treaties signed by the President, and a "precedent file" consisting of copies of documents relating to certain Presidential actions determined by the White House Clerk to have precedential value for use in case similar actions are called for in the future. These documents have not traditionally been among those that Presidents have taken with them upon leaving office, and appellant claims no rights to them in this lawsuit.

D. The Decision of the Three-Judge Court

The district court held that the Act necessarily contemplates a process of government review and classification of all of appellant's Presidential materials and thus presents ripe constitutional issues (pp. 28a-31a, *infra*). Although the court upheld as a valid purpose of the Act the "historical preservation" of the materials for use by historians, journalists and other members of the public, the court declined to consider any claims it believed were dependent upon potential public access because it felt that regulations which the Administrator might adopt "could eliminate the basis for [such] objections" (pp. 26a-27a, *infra*).[11] In refusing to consider the effect of public access on the claims appellant presented, the court, nevertheless, approved four separate purposes of the Act which are served only by availability of the materials to the general public (pp. 58a-61a, *infra*).

After an extensive discussion of the argument that Congress had violated the principle of separation of powers by enacting sweeping legislation dealing with the documents maintained by a Chief Executive, the district court rejected the argument on the ground that it embodied an "archaic view" of "three airtight departments of government," and that no such "stiffly formal and mechanistic view of government" is constitutionally required (pp. 33a-35a, *infra*). The court also ruled that the doctrine of Presidential privilege—recognized by this Court in *United States* v. *Nixon*, 418 U.S. 683, 703-707 (1974)—is "less forceful" when the claim to preserve confidentiality is made by a Pres-

[11] For reasons stated below, we believe the district court erred in treating questions relating to public access as premature. See discussion pp. 21-22, *infra*.

ident after leaving office, and that only "minimal" intrusion is involved when "archivists" review a President's private deliberations (pp. 39a-46a, *infra*). The district court also found that the Presidential interests in confidentiality were outweighed by the public interest in control and disclosure (pp. 48a-61a, *infra*).

The court below found the invasion-of-privacy claim to be "the most troublesome challenge" in the case (p. 67a, *infra*). Despite appellant's claim of privacy rights in all the tape recordings and in many documents, the district court considered the privacy claim only in connection with materials not related to "the conduct of the presidency."[12] The court observed that among the items subject to the Act were "some papers and materials containing extremely private communications between [appellant] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files" (p. 71a, *infra*). Here, too, the contention that *public* access to such personal papers would violate constitutional rights was held to be "premature" (p. 68a, *infra*), but the court discussed, at length, the intrusion on appellant's privacy caused by the governmental screening which necessarily accom-

[12] The court at one point in its opinion observed that even as to the tape recordings, the proportion of conversations that "implicate plaintiff's privacy . . . appears to be quite small . . ." (p. 69a, *infra*). Apparently this conclusion rested on the assumption that most of the conversations "must surely relate primarily to the conduct of the presidency," and the further assumption that such conversations do not "implicate Mr. Nixon's privacy rights." (p. 71a, *infra*). It was and is Mr. Nixon's claim, however, that he had a reasonable expectation of privacy in *all* the tape recordings as well as certain of the documents, and that they are thus protected from governmental seizure and review by, *inter alia*, the Fourth Amendment. (See discussion pp. 22-25, *infra*.)

panies administration of the Act (pp. 69a-89a, *infra*). It concluded that, "on balance," the Act was a "reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives" (p. 87a, *infra*). In determining that the law was "reasonable" and, therefore, constitutionally permissible under the Fourth Amendment, the court analogized the Act to the electronic surveillance provisions of Title III of the Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, to civil administrative searches, and to procedures for dealing with "intermingled documents" at the prearraignment stage of a criminal proceeding (pp. 75a-83a, *infra*). It also relied on the assumption that review would be made by "discreet and professional government archivists" and on "the special circumstances before us in this case" (pp. 88a-89a, *infra*).

The district court also rejected appellant's First Amendment claims and the contention that he was singled out for a bill of pains and penalties. The court concluded that the law was not "punitive" in design and that it will not "in any significant way chill association by or with future presidents" (pp. 98a-103a, 91a-93a, *infra*). The court also concluded that appellant's materials were in a "unique status" and that this particular quality justified singling out the documents of his Presidency for distinctive treatment. It observed that because legislation regarding an *incumbent* President might "directly and adversely [affect] . . . executive policymaking" (p. 94a, *infra*), Congress was justified in dealing only with materials of one who was "in the intermediate status of having

terminated his service as President but not yet having established a presidential library" (p. 94a, *infra*).[13]

THE QUESTIONS ARE SUBSTANTIAL

This case raises issues of constitutional principle that are fundamental to our system of government and that call for authoritative consideration and resolution by this Court. All of the issues presented are matters of first impression, for this is the first occasion in two hundred years in which Congress has enacted legislation purporting to control the disposition and eventual publication of a President's most confidential thoughts, communications, and deliberations. The power of Congress so to influence the internal affairs of the White House transcends the parties to this particular action and the circumstances of this particular case. Whether the Constitution permits the exercise of such authority with respect to a coequal branch of government should be determined conclusively by the decision of this Court. That decision, moreover, will have a major impact upon further legislation governing the papers of other constitutional officeholders, legislation which—as reflected by Title II of the Act—is presently contemplated by Congress.

1. *Separation of Powers.* By seizing and authorizing review and potential disclosure of the materials of appellant's administration, Congress has launched an unprecedented invasion of the autonomy of the Executive Branch. It is difficult to conceive of a more

[13] In this regard, the court did not suggest what distinction was to be drawn as to the materials of other former Presidents that have not yet been donated to the United States for inclusion in their Presidential libraries.

intrusive form of control by one branch of government than dominance of the confidential, internal communications and files of a coequal branch. Would the Constitution permit the Congress to enact a "Judicial Materials Preservation Act" that would subject to "complete possession and control" of the government every memorandum and document kept by federal judges, including the Justices of this Court? Could Congress direct a federal officer to make such materials "available" to other federal agencies or to compose regulations, taking into account enumerated "factors," under which judges' memoranda or drafts of opinions would be made accessible to the public irrespective of the wishes of their authors?[14]

This Court stated in *Humphrey's Executor* v. *United States,* 295 U.S. 602, 629-630 (1935), that it was "hardly open to serious question" that the principle of separation of powers requires each of the three branches of the federal government to be "free from the control or coercive influence, direct or indirect, of either of the others." This, said the Court, was an "application of a principle that makes one master in his own house" and that "precludes him from imposing his control in the house of another who is master there." 295 U.S. at 629. See also *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1932).

The district court did not deal with these considerations but disposed of appellant's separation of powers argument by terming it "archaic" and prem-

[14] Justices have, of course, felt free to destroy their own papers to prevent public inquiry into the confidential deliberative processes of the Court. *E.g.*, Black, My Father: A Remembrance 250-255 (1975). And the inherent power of the Court to protect the confidentiality of its internal operations has been previously noted. *New York Times Co.* v. *United States,* 403 U.S. 713, 752, n.3 (1971) (Burger, C.J., dissenting).

ised upon "metaphysical abstractions," and by rejecting the doctrine of *Humphrey's Executor* and *O'Donoghue* as a "stiffly formal and mechanistic view of government" (pp. 33a-35a *infra*). Adopting what it chose to call "a more modern view," the district court held that the Act did not trench *unduly* upon the functions and prerogatives of a President.

The district court's action was improper for several reasons. First, the basic principle underlying *Humphrey's Executor* and *O'Donoghue*—that the Constitution restricts the measures that one branch can employ to interfere with or influence the internal operations of another—is as valid today as it was when those cases were decided, as this Court has recognized only recently. *United States* v. *Nixon,* 418 U.S. 683 (1974). Quite simply, if one is unable to vouchsafe to one's immediate subordinates that oral and written recommendations, proposals and comments will be kept confidential,[15] one is no longer "master in one's own house" in any sense of the term.

Second, if this Court's precedents are to be repudiated, it is this Court which should assume that responsibility, not the lower courts. And finally, even if the district court were correct in its assessment that the doctrine of separation of powers is to be

[15] This "very important interest in confidentiality of presidential communications," is, of course, subject to exception in particular cases if an overriding constitutional interest is demonstrated for disclosure of a particular communication, and if the conditions of the disclosure are minimally intrusive. *United States* v. *Nixon,* 418 U.S. 683 (1974). But the weight that this Court has assigned to the interest in confidentiality of Presidential communications and the limited circumstances under which the Court has approved disclosure of those communications gainsay the Congress' asserted right to seize, explore, and disclose every Presidential communication over a five-year period.

viewed differently today, that court erred in concluding that the seizure of confidential Presidential materials would not violate present separation-of-powers standards. We agree, of course, that the three branches of government are "partly interacting, not wholly disjointed" (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). Accordingly, Congress might, if it acted carefully and within narrow limits to implement overriding *constitutional* interests, compel specific disclosures of Executive Branch information. But in this case, Congress employed not a delicate scalpel, but a cleaver. It directed that control be exercised over *every* paper and recording of appellant's administration, and undertook to determine precisely how that control should be exercised. The practical effect of Congress' action is to make uncertain the confidential status of communications of current employees of the Executive and Judicial Branches. Whether they may remain confidential or be opened to public scrutiny appears to be at the choosing of the Legislative Branch. Neither the Executive nor the Judicial Branch may exercise similar powers with regard to internal memoranda or communications of the Legislature, and we believe the Constitution did not contemplate giving such unusual power to the Congress.

The line between the materials of incumbent and past Presidents—on which the court below relied so heavily—is more of a "metaphysical abstraction" than the practical, experience-based, separation-of-powers argument made by appellant. If Congress may, immediately upon termination of a President's tenure in office, impound his documents and other materials and prescribe the terms of their public

disclosure, the effect on the President and his advisors is the same as if their communications were currently open to public inspection. The inevitable posturing for sake of appearance, and the reluctance to advance unpopular or novel positions, will diminish the President's ability to make the informed decisions vital to his role under the Constitution.

2. *Presidential privilege.* Even were the Act more discriminating in scope or more careful in the procedures it prescribes, it would suffer from constitutional infirmity in its failure to accord sufficient weight to the "protection of the confidentiality of Presidential communications" which, as this Court recently recognized, has "constitutional underpinnings." *United States* v. *Nixon,* 418 U.S. 683, 705-706 (1974). The "presumptive privilege for Presidential communications" (418 U.S. 683, 708) may be overcome when what is sought is "disclosure of a limited number of conversations preliminarily shown to have some bearing on . . . pending criminal cases." 418 U.S. 683, 713. But the Act challenged here does not relate to a "limited number of conversations." Nor is there any requirement in the Act that the conversations or documents be disclosed only after a conversation has been "preliminarily shown to have some bearing" on a pending judicial proceeding. Moreover, the Act's provision purporting to reserve a person's right to "assert rights and privileges" to prevent disclosure has the practical effect of reversing the burden described by this Court for preserving Presidential confidentiality. 418 U.S. 683, 713-714.

The court below concluded that "mere screening by archivists, whose record for discretion in handling confidential material is unblemished" (p. 45a, *infra*)

entails little violation of Presidential confidentiality. Yet in *United States* v. *Nixon,* which involved disclosure to a grand jury, whose proceedings are secret, and to a prosecutor, equally sworn to secrecy (a protection not found in archival screening), this Court recognized that *any* possible breach of a President's assurance of confidentiality (even to a court *in camera*) can cause advisors to "temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process" and thus inhibit "candid, objective and even blunt or harsh opinions in Presidential decisionmaking." 418 U.S. 683, 705-708.

In this respect, the court below should not have treated as premature the impact on Presidential advisors of *possible* public access to confidential conversations and memoranda over a former President's objections. The precise content of the Administrator's regulations under the Act may make ultimate disclosure of a particular conversation more or less probable; but there is an unavoidable "chilling" effect on the b'untness of advice given by a Presidential advisor if he knows that the public *may* be given future access to his private views under regulations to be drafted by a government administrator, and approved by Congress, after the President has left office.

Nor is it realistic or meaningful to expect appellant or anyone else to protect their rights and privileges by litigating possible public disclosures on a piecemeal basis after the Administrator's regulations take effect. In *Buckley* v. *Valeo,* —— U.S. ——, 96 S.Ct. 612 (1976), this Court overruled similar lower-court conclusions that important constitutional issues were "unripe" for resolution. See *id.* at 666 n. 113 (Ques-

tion 7(a)); at 693 n. 177 (Questions 8(c), 8(d), 8(e)). Here the matters are ripe, for the countless decisions concerning public disclosures of appellant's thousands of conversations simply cannot be challenged and litigated individually.

3. *Invasion of Privacy.* The court below found the invasion-of-privacy claim "the most troublesome" (p. 67a, *infra*) and admitted that it did not "find it easy to dispose of" appellant's privacy challenge to the Act (p. 87a, *infra*). It rejected the challenge, nevertheless, by determining that the invasion was "reasonable" and that no warrant was required. This Court's decisions make it clear, however, that "reasonableness" is not the sole constitutional measure for statutory invasions of privacy. See *e.g., Roe* v. *Wade,* 410 U.S. 113 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). These same decisions indicate that even where the warrant requirement is not applicable, the constitutional right to privacy is protected against infringement by a legislative directive. Moreover, in the principal analogy relied on by the court below—authorization for electronic surveillance under Title III of the Safe Streets Act of 1968—an invasion of privacy is permitted only upon a showing of probable cause of the commission of a crime demonstrated to the satisfaction of a neutral and detached magistrate. Additionally, the invasion must be carried out under statutorily imposed "precise and discriminate" standards, the absence of which led this Court to hold facially unconstitutional a New York wiretapping law. *Berger* v. *New York* 388 U.S. 41 (1967). The lower court recognized that this Act was deficient in that respect and that "the parallel is not, of course, perfect," but the court felt that future regulations could remedy the problem (pp. 81a-82a, *infra*).

We know of no law ever enacted by Congress authorizing government seizure of all the papers and effects of a man's life covering a five-and-one-half year period. Like every President before him, appellant's entire personal, political and official life is embodied in the materials accumulated during his Presidency. And under the Act, as the lower court recognized, there will be an unavoidable "comprehensive screening" by at least three levels of government employees (and possibly non-government appointees) of this intensely private material. (p. 71a, *infra*).

To minimize the significance of this invasion, the court asserted that because the recorded conversations occurred in appellant's office (as opposed to his home), the "ratio" of personal conversations to those concerning his political and official activities "appears to be quite small" (p. 69a, *infra*).[16] This limitation of privacy protection to appellant's *personal* discussions is contrary to this Court's statement that "[t]he expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens . . . ." *United States* v. *Nixon,* 418 U.S. 683, 708. The Court was speaking there not of family or personal discussions, but of a President's communications with his staff concerning all matters.

Moreover, there can be no doubt that appellant had a "reasonable expectation of privacy" in *all* his records of Presidential conversations. The prerogative of

[16] This conclusion contrasts markedly with the court's statement in its Presidential privilege discussion that "significant portions of the tape recordings, are not related to the discharge of presidential duties and hence fall outside the scope of [the privilege's] protection" (p. 41a, *infra*).

preserving confidentiality had been exercised by every other former President, had been implicitly recognized by the only two courts ever to address questions concerning Presidential papers,[17] and had been accepted by Congress, as illustrated by the legislative history of the Presidential Libraries Act of 1955[18] and the joint resolution authorizing acceptance of the Franklin D. Roosevelt Memorial Library in 1939.[19] Accordingly, the lower court erred in suggesting that government review of all of appellant's recorded conversations while President would be only a minimal intrusion upon his privacy.[20]

Finally, a major factor relied upon by the lower court to sustain the "reasonableness" of the privacy invasion was that the search would be carried out by "professional and discreet" government archivists. But the constitutionality of an admitted invasion of privacy has never been justified by the professionalism or discretion of the government employees who will conduct

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[17] *Folsum* v. *Marsh*, 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841); *In re Roosevelt's Will*, 73 N.Y.S. 2d 821 (Surr. Ct. 1947).

[18] Hearing on H.J.Res. 330, 331, 332, Before the Special Subcommittee of the Committee on Government Operations, 84th Cong., 1st Sess. at 14, 28, 58-59 (June 13, 1955).

[19] 84 Cong. Rec. 6628, 9046 (1939).

[20] Contrary to the lower court's suggestion, appellant never intended the recordings of his conversations or his diary to be reviewed by anyone other than himself or his family. When he left office, he instructed that all of the materials be sent to him in California. However, even after the Attorney General concluded that appellant owned the material, the government refused to release it because the Special Prosecutor insisted that his staff first be able to search the tapes and documents.

the search. The intrusion on the sanctity of a man's life by government personnel is itself what the Constitution forbids. That the government intruders may refrain from exposing to the public the personal information they find does not make the privacy invasion "reasonable." Moreover, in casting the government archivists in the role of neutral and detached magistrates, the district court ignored the fact that the very determination committed to the archivists under the Act—whether material is of historical significance so as ultimately to be made available to the public or whether it should be returned to appellant as purely personal *and* without historical value—is a determination as to which archivists are not likely to be neutral. Their professional commitment to public access for historical purposes is evidenced by the strong representation of government archivist personnel among the membership of the various associations that are contesting appellant's claims in this case.

4. *Free Speech and Association.* The district court found that Mr. Nixon "appears to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening [of his Presidential materials] took place" (p. 91a, *infra*), but again belittled the significance of the matter by assuming that only a very few items "truly implicate" Mr. Nixon's First Amendment claim (p. 90a, *infra*). The court's assumption about the nature of the Presidential materials ignores the observation by Dr. Herman Kahn of Yale—the person in this country who, until his death a year ago, was most familiar with Presidential papers—that with any President, "at least 50 percent, probably more, of what we call the President's papers are

political rather than governmental in character." Dr. Kahn went on the explain:[21]

> "I use the word political here not in any derogatory sense but in its truest and highest sense, as meaning public leadership, the successful functioning of party activities, and the marshalling of public and political support for the President's policies, programs, views, and the issues that he lays before the public. These are not records of governmental action. They are ancillary to and related to Government as all politics is related to Government, but they are not governmental records in the sense that they are records created by the President in the course of carrying out acts of Congress or otherwise acting in his formal constitutional capacity as Chief Executive or Commander in Chief. Because of the nature of his office, political matters inevitably are diffused through a very large part of what we call the papers of the President."

The principle established by the district court's upholding of this Act is that Congress, for the sake of preserving the historical record and informing Congress and the public about "abuses of power," may summarily seize all records of the political activities and communications of a President or any other constitutional officeholder, have them reviewed and classified by government personnel, and place upon the individual the burden of contesting, as to each and every document or recording, whether it shall be made public. This Court has very recently reaffirmed the principle that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed

[21] Hearings Before the Subcommittee on Printing, Committee on House Administration, 93d Cong., 2d Sess. at 93-94.

by the First Amendment," and that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley* v. *Valeo,* —— U.S. ——, 96 S.Ct. 612, 656 (1976). The governmental interests advanced to support the encroachment "must survive exacting scrutiny." *Id.* Whether the purported interests relied upon by the district court in this case to justify the blanket seizure and governmental review of the entire record of one President's political activities during his term in office is a question that demands full consideration by this Court.

5. *Bill of pains and penalties and denial of equal protection.* The legislative history of this Act confirms, we submit, what may fairly be inferred from its plain language—that it was devised to impose unique disabilities on a single individual as the culmination of an extraordinary series of events in our Nation's history. If Congress believed that all Presidential materials warrant the kind of control and screening that has been established by this law for appellant's papers, it could have enacted a statute dealing generally with the subject of Presidential documents. Instead, it covered only the period between January 20, 1969, and August 9, 1974, and the Act names the appellant specifically. This kind of legislation violates the constitutional rule set out by this Court in *United States* v. *Brown,* 381 U.S. 437, 450 (1965), which permits Congress to enact only "a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics" is subject to the statute but prohibits Congress from "designat[ing] . . . the persons who possess the feared characteristics." This Act is not one of the "gen-

eral rules for the government of society"; it is "the application of those rules to individuals in society"—and therefore not a proper subject for legislation. See *Fletcher* v. *Peck,* 6 Cranch 87, 136 (1809).

For similar reasons, the Act denies appellant the equal protection of the laws to which he is constitutionally entitled. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Whatever legitimate legislative interests might be said to justify seizure of *all* of a President's papers and effects apply equally to the materials of the current President and to the materials of those who preceded appellant in office. The legislative decision to single out appellant by name violates the long-standing rule that a legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920); *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438, 446-447 (1972).

CONCLUSION

At issue in this litigation is the validity of Congress' attempt to take from a President, for the first time in this Nation's history, the authority to determine whether and when the documents and other materials of his administration shall be disclosed. The reasons given by the court below for rejecting appellant's challenges to the law are unsound and the constitutional issues presented are of extraordinary importance. Probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1852

RICHARD M. NIXON, PLAINTIFF

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,
DEFENDANTS

and

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,
JACK ANDERSON, LILLIAN HELLMAN, *et al.*,
INTERVENOR-DEFENDANTS

January 7, 1976

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Before McGOWAN and TAMM, *Circuit Judges*, and ROBINSON, *District Judge*.

Summary

In this action, plaintiff Richard M. Nixon has challenged the constitutionality of Title I of the Presidential Recordings and Materials Preservation Act. The Act directs the Administrator of General Services to take custody of Mr. Nixon's presidential papers and tape recordings, and to promulgate regulations that would provide for the orderly processing of such materials for the purpose of returning to Mr. Nixon such of them as are personal and private in nature, and of determining the terms and conditions upon which public access may eventually be had to those remaining in the Government's possession. In designing such regulations, the Administrator must consider the need to protect the constitutional rights of plaintiff and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained. Title II of the Act establishes a Commission to study the final disposition of the records of federal officials generally, and to report its recommendations to Congress. The court concludes that there is no constitutional infirmity in the Act on its face requiring its enforcement to be enjoined.

Scope of Inquiry

The court, responding to its duty to avoid constitutional questions whenever possible, considers only those questions of the Act's constitutional validity that are immediately ripe for resolution. As no regulations have yet taken effect, and as such regulations once effective are explicitly made subject to judicial review, the court considers only the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and

their screening by government archivists. Slip op. at 18-31 *infra*.

Claims Relating to the Separation of Powers

The court finds nothing in the separation of powers doctrine to support the contention that the legislature may not pass a statute in any way touching upon the prerogatives of the Executive. The only genuine separation of powers claim is that the Act might invade the presidential privilege that attaches to the small fraction of the materials that genuinely implicate presidential confidentiality. Although the court thinks it doubtful that a former President, rather than the incumbent, may assert such privilege, at the very least such a claim is entitled to relatively less weight in the balance of competing considerations. And the infringement upon presidential confidentiality caused by screening by trained and discreet government archivists, who have been employed to perform identical tasks for the materials of every President since Herbert Hoover, is very slight. The court finds, on the other hand, that Congress had ample reason to mandate screening by government archivists rather than control by Mr. Nixon, who lacks their expertise and disinterestedness. The two most important of the interests served by preservation and responsible treatment of presidential materials are (1) maintaining a complete and accurate historical record and (2) assuring the availability of the materials potentially needed for continuity in executive policymaking. Other interests served by the Act include informing the public about the Watergate matters and ensuring the availability of materials that may be relevant to legislative investigations or judicial proceedings. Because of the manner in which personal materials are intermingled with official ones, comprehensive screening represents the only feasible

manner of protecting these important interests. The court finds that the slight inroad on presidential confidentiality caused by such screening is outweighed by the need to further these important legislative objectives. Slip op. at 31-66 *infra*.

Claims Relating to Privacy

It appears from the record that plaintiff can validly claim a privacy interest in only a small fraction of the materials. Yet due to the historical practice of *de facto* control by Presidents of presidential materials, the court finds that regardless of where ownership of the materials lies—a question that need not be reached—plaintiff has a reasonable expectation of privacy in these materials, an interest that is infringed even by mere screening by government archivists conducted under legislation with retroactive application. In light of the intermingled nature of the materials, the court finds such infringement of privacy interests to be an inescapable concomitant of any attempt to serve the important legislative objectives underlying the Act. The private materials are far outnumbered by those that are non-private and related to those objectives. The court further finds that any invasion of privacy caused merely by archival processing—rather than by public access, which need not yet be considered—is not wide-ranging. In addition, less justification is needed when, as may be the case here, any invasion of privacy constituting a search and seizure does not serve law enforcement objectives. In light of these factors and the unavailability of less intrusive means of furthering the important legislative ends, the court concludes that any intrusion upon plaintiff's privacy interests has adequate justification. Slip op. at 67-89 *infra*.

Freedom of Speech and Association

Plaintiff's First Amendment claim is predicated upon the assumption that all materials—including those impli-

cating privacy in political association—will be open to public access. The court finds no basis for that assumption. Rather, reaching only that infringement of First Amendment interests caused by screening by government archivists, the court finds any injury to protected interests arising from a confidential review process to be insubstantial. Slip op. at 89-93 *infra*.

Equal Protection

The court finds that any difference in treatment between plaintiff and other Presidents is adequately justified. As respects immediate past Presidents, their papers had already been deposited in presidential libraries where, on the whole, their availability to promote important governmental interests was assured. As respects current and future Presidents, legislating with respect to them risked disrupting current executive policymaking, and would be unwise before the Commission study of the sensitive and complex problems involved in regulating the records of federal officials had been completed. Only plaintiff has finished his service as President but has not yet established a presidential library. Prompt congressional action was reasonably deemed necessary to assure that the materials would remain preserved, and to begin the lengthy process of reviewing and classifying them. Finally, Congress could legitimately consider plaintiff to be less likely than his immediate predecessors or successors to dispose of the materials responsibly. Slip op. at 93-97 *infra*.

Bill of Pains and Penalties

There is, in the court's view, no evidence in the legislative record to support the claim that the Act was designed to impose, or constitutes, punishment within the meaning of the Bill of Attainder Clause. The court finds there are other legislative objectives served by the Act

which Congress could legitimately—and did—consider. Rather than possessing traditional indicia of a punitive enactment, the Act includes provisions that indicate a concern for plaintiff's interests, provisions that are wholly inconsistent with the hypothesis of punitive intent. Slip op. at 97-103 *infra*.

OPINION

MCGOWAN, *Circuit Judge*: On December 20, 1974, plaintiff filed this suit, alleging that the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526 (Dec. 19, 1974), 88 Stat. 1695, 44 U.S.C.A. §§ 2107 note, 3315-24 (Supp. I, Feb. 1975), [hereinafter "the Act"] is unconstitutional and seeking injunctive and declaratory relief. Jurisdiction was premised on section 105(a) of the Act, which grants the United States District Court for the District of Columbia exclusive jurisdiction to hear challenges to the constitutional validity of the Act. A three-judge district court was, on plaintiff's motion, eventually convened pursuant to 28 U.S.C. §§ 2282, 2284 (1970), as the action sought on constitutional grounds to enjoin the enforcement of a federal statute. Plaintiff alleges that the Act infringes the powers of the President; invades his presidential privilege; infringes his constitutional rights of privacy, free speech, and free association; is an unconstitutional search and seizure; denies him equal protection of the laws; and is an unconstitutional bill of pains and penalties. For the reasons appearing below, we hold that there is no constitutional defect apparent from the face of the Act requiring us to enjoin its operation.

I. BACKGROUND

Plaintiff was, of course, the President of the United States from January 20, 1969 to August 9, 1974. He resigned on the latter date, less than two weeks after the House Judiciary Committee had voted to recommend his

impeachment. H. R. REP. No. 93-1305, 93d Cong., 2d Sess., at 10-11 (1974). When he left office, Mr. Nixon had no intention of permanently leaving the materials accumulated during his administration[1] in the White House,

[1] To understand what materials are at issue in this case it is important to understand the filing system employed in the White House. The basic filing unit is the Central Files, in which copies of a wide variety of records are maintained according to subject. Included therein are incoming and outgoing correspondence of the President and his staff, reports, memoranda, and various other documents. Members of the White House staff are supposed to send virtually all papers (or copies thereof) relating to their official functions to this filing unit, which serves as the basic reference system for presidential papers. *See* Affidavit of William F. Matthews at 1-2, exhs. A, B, E [hereinafter "Matthews Affidavit"].

A few sections of the Executive Office of the President (a so-called umbrella agency)—for example, the Domestic Council and the Council on International Economic Policy—interfile papers with the Central Files. *Id.* at 2; Deposition of Jack Nesbitt in *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975), at 15 [hereinafter "Nesbitt Deposition"]. On the whole, however, component parts of the Executive Office—including the Office of Management and Budget, the Office of Telecommunications Policy, the Council of Economic Advisors, and the Council on Environmental Quality—maintain separate files. Nesbitt Deposition at 15, 19; Matthews Affidavit at 2; Affidavit of William J. Hopkins at 2 [hereinafter "Hopkins Affidavit"]. The National Security Council maintains a set of institutional files relating to the internal decisionmaking and policymaking processes of the Council. It also maintains "non-institutional" files, which include

> records of negotiations with foreign governments, correspondence with foreign heads of state and government, correspondence—including presidential directives—with agencies in the Executive Branch on matters concerning foreign affairs but not considered part of the NSC institutional process . . . .

Affidavit of Jeanne W. Davis at 3. Included within the Central Files, however, are materials sent from departments or agencies of the Executive Branch—including the Executive

Affidavit of Richard Nixon at 2 [hereinafter "Nixon Affidavit"], and immediately after his resignation government archivists began to collect these materials and box

Office of the President—to the President or his staff. Matthews Affidavit at 2.

During the last three years of Mr. Nixon's presidency, a subsection of the Central Files, known as the Special Files, was established for various kinds of sensitive material. Affidavit of Gertrude Fry at 1-3. This was an innovation and the practice has since been discontinued. *Id.* Another subsection of the Central Files, of less recent origin and continuing use, is the Precedent File. This file collects on a less than systematic basis materials dealing with unusual subjects that might provide useful precedents were similar situations to arise—for example, materials relating to how the configuration of the American flag was changed when Hawaii and Alaska were admitted to the Union. Matthews Affidavit at 2; Hopkins Affidavit at 6-7.

Outside of the Central Files, there are three other principal places where records are kept. First, the Records Office in the White House maintains a Card File which records only the fact that certain actions were taken by the White House. For example, were a President to veto a bill, the fact that such action was taken would be recorded in the Central Files; the official document transmitting the veto would be sent to Congress; and any underlying material relating to the formulation of the veto decision and message would be sent to the Central Files. Hopkins Affidavit at 5. Second, the Administrative Office of the White House maintains files relating to personnel, purchases, and accounts. *Id.* at 6. Third, each staff member may retain individual files relating to his own activity, and the President may maintain a personal file; but, as noted above, the originals or copies of materials in staff files are supposed to be sent to the Central Files.

Plaintiff claims the right to dispose of the tape recordings made during the Nixon presidency and all the materials for the same period described above, except: (1) the Card File in the Records Office; (2) the Precedent File of the Central Files; (3) the separate files of component parts of the Executive Office of the President (including the National Security Council institutional files); (4) the files of the Administrative

them for shipment to California. Deposition of Jack Nesbitt in *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975), at 38-43.[2]

Shipment was halted by the new administration after the Watergate Special Prosecutor informed the White House of his continuing need for the materials. Deposition of Benton L. Becker in *Nixon v. Sampson, supra*, at 6-11 [hereinafter "Becker Deposition"]; Affidavit of Peter M. Kreindler in Support of Motion of Leon Jaworski, Special Prosecutor, to Intervene in *Nixon v. Sampson, supra*, Oct. 21, 1974, at 2-3; Deposition of Philip W. Buchen in *Nixon v. Sampson, supra*, Vol. I, at 4-7, Vol. II, at 10-11, 73-74 [hereinafter "Buchen Deposition"]. While the materials remained at the White House, Philip W. Buchen, Counsel to President Ford, solicited and received from the Justice Department a preliminary opinion that the materials were plaintiff's private property. Buchen Deposition Vol. I, at 7, 11-12.[3] At or around the same time, negotiations about them between the White House and Mr. Nixon's attorney commenced. Buchen Deposition Vol. I, at 14-15, Vol. 2, at 36-48, exhs. 4, 5; Becker Deposition at 28-29, 35. These negotiations culminated in an agreement whose terms

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Office; and (5) materials in the files of individual staff members of which there is no duplicate in the Central Files and which were not gathered by archivists who, shortly after Mr. Nixon's resignation, attempted to accumulate from staff members all non-personal materials, *see* p. 63 *infra*. Plaintiff's Brief at 9-24.

[2] Although no evidentiary hearing was held by this court, various depositions, testimony, affidavits, and other evidentiary materials are in the record on the basis of stipulations by the parties.

[3] This opinion was subsequently confirmed officially by the Attorney General. *See* 43 OP. ATT'Y GEN. No. 1 (Sept. 6, 1974).

were elaborated in a letter from plaintiff to Arthur F. Sampson, Administrator, General Services Administration (GSA), dated September 6, 1974 and which was accepted by Sampson the next day. Deposition of Arthur F. Sampson in *Nixon v. Sampson, supra*, exh. 1; Buchen Deposition Vol. 2, at 36-48; Becker Deposition at 50-51, 103.

In its most important features, the Nixon-Sampson agreement provides that all "presidential historical materials" [4] accumulated during the Nixon presidency were to be placed under deposit pursuant to the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.* (1970), and transferred to the Administrator of GSA, under whose custody they would be shipped at Government expense to a Government facility in California near Mr. Nixon's residence. For a period of three years or, in the case of tape recordings, five years, access to the materials would be limited to Mr. Nixon or persons authorized by him, although access required two keys, one in Mr. Nixon's and one in GSA's possession. No original materials could be withdrawn during this initial stage, but Mr. Nixon could reproduce any document and, with the agreement of GSA, any tape recording. If any materials under deposit were sought by legal process, Mr. Nixon was to receive immediate notification to enable him to assert any rights or privileges he might have, and he agreed to afford the United States the same opportunity. After the three-year period had expired, Mr. Nixon could withdraw from deposit any documentary materials he wished and dispose of them as he saw fit. As of September 1, 1979, Mr. Nixon made a gift to the United States of the tape recordings, subject to the conditions that he could direct destruction of such tapes as he wished and that all of them were to be destroyed

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[4] *See* note 6 *infra*.

if Mr. Nixon died and in any event not later than September 1, 1984.[5]

After implementation of this agreement had been delayed at the instance of the Special Prosecutor and negotiations between the Special Prosecutor and plaintiff's attorney reached an impasse, plaintiff filed suit in the district court. *Nixon v. Sampson, supra.* That action, brought on October 17, 1974, named Sampson, Buchen, and H. Stuart Knight, Director of the Secret Service, as defendants, and sought to enforce compliance with the terms of the Nixon-Sampson agreement. Shortly thereafter, two groups of plaintiffs (both of which are intervenor-defendants in the case at bar) brought suit seeking to have the materials declared the property of the United States Government, to enjoin their transfer to Mr. Nixon, and to gain access to them under the Freedom of Information Act, 5 U.S.C. § 552 (1970). In one such action, *Hellman v. Sampson,* Civil No. 74-1551 (D.D.C., filed Oct. 24, 1974), Mr. Nixon was named as a defendant along with government officials; in the other, *Reporters Committee for Freedom of the Press v. Sampson,* Civil No. 74-1533 (D.D.C., filed Oct. 21, 1974), he was subsequently permitted to intervene, *Nixon v. Sampson, supra,* at 118. Ultimately, these two actions were consolidated with the suit brought by Mr. Nixon, and both the Special Prosecutor and Jack Anderson, a newspaper columnist, were permitted to intervene in Mr. Nixon's suit, the former as a defendant and the latter as a plaintiff. *See id.* at 114, 117-18.

Before that litigation had been filed, Congress had commenced consideration of legislation dealing with the

[5] The agreement is reprinted as an appendix to both the Senate and House of Representatives committee reports. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess. (1974); H. R. REP. No. 93-1507, 93d Cong., 2d Sess. (1974).

disposition of presidential papers. After enactment by Congress, the Act was signed into law by President Ford on December 19, 1974. The Act, which supersedes the Nixon-Sampson agreement, directs GSA to obtain possession of (1) all tape recordings of conversations recorded by any federal official which involve Mr. Nixon or any other employee of the Federal Government and were recorded, during the time Mr. Nixon was President, in the White House or other offices used by Mr. Nixon (section 101(a)); and (2) all "Presidential historical materials" for the same period (section 101(b)).[6] All items in the custody of GSA are to be available to legal process, subject to any rights, defenses or privileges invoked by the Government or any individual (section 102(b)); to Mr. Nixon or his designee (section 102(c));[7] and to any agency or department of the Federal Government for lawful Government use (section 102(d)).[8]

[6] Section 101(b)(2) incorporates by reference the definition of "historical materials" given in 44 U.S.C. § 2101 (1970), which reads in relevant part:

> "historical materials" including [sic] books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value.

[7] Although neither the Act nor the regulations promulgated pursuant to § 103 of the Act, *see* note 8 *infra,* explicitly grant Mr. Nixon the right to reproduce any materials, § 102(c) provides that he shall have access "for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103." All counsel at the oral argument on the merits appeared to agree that plaintiff would be able to reproduce the materials retained in government custody.

[8] Section 103 of the Act merely directs the Administrator to issue regulations to assure preservation of the materials in

Under section 104(a) of the Act, the Administrator is directed to promulgate regulations governing public access to the materials covered by section 101, taking into account the following seven factors:

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
>
> (4) the need to protect every individual's right to a fair and impartial trial;
>
> (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
>
> (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

The regulations must be submitted to Congress, either House of which has ninety legislative days to disapprove them before they take effect (section 104(b)(1))—a power the Senate exercised with respect to the initial set of

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custody and to prevent unauthorized access to them. Such regulations have been promulgated. *See* 40 Fed. Reg. 2669 (1975), *to be codified as* 41 C.F.R. §§ 105.63.101-.303.

regulations drafted by GSA. 121 CONG. REC. S 15803-08 (daily ed. Sept. 11, 1975). Thereafter, on October 15, 1975, GSA submitted a revised set of regulations to Congress. As of this date, however, no regulations have yet taken effect.

Section 105 of the Act grants exclusive jurisdiction to the District Court to hear a variety of actions involving the Act, regulations promulgated thereunder, or materials covered by section 101 (subsection 105(a));[9] contains a standard separability clause (subsection 105(b)); and authorizes payment of funds to any individual who is found to have been deprived by the Act of private property without compensation (subsection 105(c)).

Title II of the Act establishes a National Study Commission on Records and Documents of Federal Officials, composed of members of Congress, the Executive, the Judiciary, and private citizens from the archival and learned professions. 44 U.S.C.A. § 3318 (Supp. I, Feb. 1975). The Commission's mandate is to study problems and questions relating to the disposition and preservation of records and documents produced by federal officials, with a view toward appropriate legislative recommendations. *Id.* § 3317. Although the Commission's report to

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[9] Section 105(a) provides:

> The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

the President and Congress is to be submitted by March 31, 1976, *id.* § 3322, as of December 10, 1975, not all of the members had yet been appointed, and the first meeting was not scheduled until December 15, 1975.

On December 20, 1974—one day after the Act was passed—Mr. Nixon filed a second action, the one now before us, against the Administrator of GSA and the United States, challenging the constitutionality of the Act, together with a request for convention of a three-judge court, which request, after some delay, was ultimately granted. *See Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975) (per curiam), *motion for reconsideration granted*, 513 F.2d 430 (D.C. Cir. 1975) (per curiam).[10] This court, by an order dated May 1, 1975,

[10] Nixon v. Richey, *supra*, also stayed further proceedings in the consolidated cases—in which an opinion has been issued, *see* Nixon v. Sampson, *supra*, but no judgment entered—in order to permit this action to proceed with priority in accordance with the mandate of § 105(a) of the Act, *see* note 9 *supra*. The Court of Appeals' opinion indicates the reasons that favor according priority to this action. 513 F.2d at 437-48. It also states that it will dissolve the stay whenever this court indicates that, in its view, the need for it no longer exists. *Id.* at 448. Following a hearing on this issue, we indicated in our order of May 1, 1975 that we concur in the discernible suggestion of Nixon v. Richey that the central purpose of Congress, in relation to all pending litigation, is to have an early and prior determination of the Act's constitutionality, and that we therefore had no disposition to request dissolution of the stay. Having now entered judgment in this action, we are simultaneously requesting the Court of Appeals to dissolve the stay, thus permitting the consolidated cases to proceed in whatever manner seems fit in light of the possibility of appeals in this action, *see generally* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.416[1-4] (1974), and cases cited.

At present, there remain outstanding four orders issued in Nixon v. Sampson granting, or modifying the grant of, temporary injunctive relief. *See* Order of October 21, 1974; Supplemental Order of October 22, 1974; Order of October 31, 1974; Order of November 7, 1974. Their net effect is as follows:

granted a motion by the Special Prosecutor to intervene, although he subsequently moved for and was granted

1) to enjoin the government defendants from effectuating the Nixon-Sampson agreement;

2) to enjoin the government defendants from disclosing, transferring, disposing of, or otherwise making known the presidential materials in custody, except as specifically provided;

3) to permit production of materials pursuant to subpoena, discovery demand, or court order in any civil or criminal case, at the behest of a grand jury, or at the behest of the Special Prosecutor;

4) to provide Mr. Nixon with access to the materials for the sole purpose of preparing to testify in the Watergate trial or determining whether to raise any privileges or defenses in opposition to demands or subpoenas for materials;

5) to permit use of the materials for current government business upon prior notification to counsel for Mr. Nixon and with the consent of Philip W. Buchen;

6) to grant any past or present member of the White House Staff, any defendant in the Watergate criminal trial, or the Special Prosecutor access to materials under the following procedures:

a) a request shall be made to Philip W. Buchen, who shall advise counsel to Mr. Nixon, the court, and the Special Prosecutor of the request;

b) upon receiving the consent of counsel to Mr. Nixon, said person shall be granted access to his/her files for the purpose of taking notes;

c) in the event it is desired to reproduce materials, notice shall be served upon counsel to Mr. Nixon, Mr. Buchen, the Special Prosecutor, and the court;

d) counsel for Mr. Nixon or Mr. Buchen shall give or withhold consent to reproduction of materials, and if consent is withheld, copies shall not be made;

e) any search for materials shall be conducted jointly by Mr. Buchen and counsel to Mr. Nixon, or his designated agent.

leave to withdraw.[11] That order also permitted the other litigants in the consolidated cases who were not named parties in the instant case—Lillian Hellman, *et al.*, Reporters Committee for the Freedom of the Press, *et al.*, and Jack Anderson—to proceed in this case as intervenor-defendants on a joint basis. It also noted our view that nothing in section 105(a), or the meager legislative history dealing with this provision, suggests that it was meant to override or negate the provisions of 28 U.S.C. §§ 2282, 2284 (1970), calling for convention of a three-judge court. *See Nixon v. Richey, supra,* at 441-42.

The order also declined to consider separately plaintiff's motion for a preliminary injunction, instead deferring that question and combining it with a decision on the merits. We now turn to that decision.

II. The Scope of Inquiry

Before examining the various constitutional issues, we emphasize that the question before us is a narrow one: Is the regulatory scheme enacted by Congress unconsti-

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[11] The Special Prosecutor's Motion for leave to withdraw, filed on September 8, 1975, stated that he had received or listened to all tape recordings that were arguably relevant to specified investigations, and had examined all files likely to contain documents pertinent to ongoing investigations and had obtained all such documents contained therein. These materials had been obtained under procedures agreed to by the Special Prosecutor and counsel for Mr. Nixon, *see* note 10 *supra,* who assured the Special Prosecutor that such procedures would remain in effect. In light of that assurance, the existence of subpoena power for use by the Special Prosecutor if necessary, and the representation by the United States of all positions the Special Prosecutor would have taken in this litigation, the Special Prosecutor believed his continuing participation to be unnecessary. We agreed, and on September 17, 1975, granted his motion.

tutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)? Our obligation to restrict our review to the question of the Act's facial validity *vel non* derives from two sources. First, as a three-judge district court, our jurisdiction is invoked because of the need to adjudicate the availability of injunctive relief against enforcement of a statute on constitutional grounds. The Supreme Court has traditionally taken a "constrictive view" of this jurisdiction. *E.g., Hagans v. Lavine,* 415 U.S. 528, 543-45 (1974); *Mitchell v. Donovan,* 398 U.S. 427, 431 (1970) (per curiam); *Phillips v. United States,* 312 U.S. 246, 251 (1941). We have already indicated in our order of May 1, 1975 that we would restrict our review accordingly to consideration of the propriety of injunctive relief against the alleged facial unconstitutionality of the statute.

Second, we are under the prudential duty to rule on the constitutionality of congressional legislation only where absolutely necessary, *e.g., Rosenberg v. Fleuti,* 374 U.S. 449, 451 (1963); *Harmon v. Brucker,* 355 U.S. 579, 581 (1958) (per curiam); *Powell v. Washington Metropolitan Area Transit Comm'n,* 466 F.2d 466, 468 (D.C. Cir. 1972) (per curiam); to formulate a rule of law no broader than is necessary to decide the case before us, *e.g., Garner v. Louisiana,* 368 U.S. 157, 163 (1961); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 461 (1945); to seek a statutory construction that avoids constitutional difficulties, *e.g., Johnson v. Robison,* 415 U.S. 361, 366-67 (1974); *United States v. Witkovich,* 353 U.S. 194, 201-02 (1957); *Buckley v. Valeo,* 519 F.2d 821, 874 (D.C. Cir. 1975) (per curiam) (en banc), *prob. juris. noted,* 96 S. Ct. 32 (Oct. 6, 1975) (Nos. 436, 437); and to refrain from ruling on speculative questions based upon purely hypothetical fact situations that may never come to pass, *e.g., Thorpe v. Hous-*

ing Authority, 393 U.S. 268, 283-84 (1969); *United States v. Raines*, 362 U.S. 17, 20-22 (1960); *Langston v. Johnson*, 478 F.2d 915, 917 (D.C. Cir. 1973).

The principal policies that underlie these concerns—the aid to constitutional adjudication provided by a concrete set of facts and adversary presentation of argument directed to those facts, and the need to limit exercise of the delicate power of judicial review to cases inescapably calling into question the constitutionality of a statute—are peculiarly relevant to the legislative scheme before us. The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104(a).[12] Those factors provide broad latitude to the Administrator in establishing the processes and standards under which the materials will be reviewed and public access to them afforded. With respect to constitutional challenges levelled against the Act by plaintiff, subsection 104(a)(5) is especially noteworthy. That subsection directs the Administrator to take into account, *inter alia*, "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

Because of the Senate's disapproval of GSA's initial proposed regulations, there are currently no regulations in effect. When regulations finally become effective, however, they could, if drafted with careful attention to the directive of subsection 104(a)(5), eliminate the basis for some of the allegations raised by Mr. Nixon that his rights

[12] One qualification of the statement in text must be made. *See* note 18 *infra*.

will be infringed.[13] Objections he now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass under the regulations finally placed in effect. Although written in the somewhat different context of a state statute with many distinct provisions, the words of the Supreme Court in *Watson v. Buck*, 313 U.S. 387 (1941), are apposite to the problem before us:

> No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the

[13] By its terms, § 104(a)(5) speaks to protection of any party's "opportunity to *assert* any legally or constitutionally based right or privilege which would prevent or otherwise limit public access" (emphasis supplied). It would be possible to adopt one (or both) of two niggardly readings of this provision: (1) the subsection applies only to limitations on access, rather than limitations on the screening process, *see* pp. 28-30 *infra;* or (2) the subsection applies only to the establishment of procedures by which such rights can be asserted, rather than standards that themselves seek to provide protection. Neither reading, it seems to us, is required by the language, and each appears to deny § 104(a)(5) the scope necessary to serve its purpose of permitting the Administrator to consider the constitutionality of any regulations he drafts to ensure that they do not deprive anyone of his constitutional protections. The second reading plainly, and the first reading impliedly, conflict with clear manifestations of congressional intent in the legislative record. *See* pp. 24-25 *infra*. The Proposed Regulations on Public Access, as revised, submitted to Congress on October 15, 1975 [hereinafter "Proposed Regulations"], plainly reject the second reading. *See* §§ 105-63.402-1, .402-2. Hence, we find no reason to so constrict the meaning of § 104(a)(5).

> separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.

Id. at 402 (alternative holding); *accord, Communist Party v. SACB*, 367 U.S. 1, 71 (1961); *United States v. Spector*, 343 U.S. 169, 172 (1952). There is, therefore, no need and no justification for this court now to reach constitutional claims directed at the regulations and that the promulgation of regulations might eliminate, limit, or cast in a different light.

It is not unlikely that the Administrator may find that the seven factors listed in section 104(a) do not coexist in perfect harmony, and compromise and accommodation of conflicting directives will be necessary.[14] Yet in resolving such conflicts the paramount concern will be that enunciated in subsection 104(a)(5), for it is to be

[14] Even within the intervenor-defendants, it is possible to discern important differences in their broader objectives. Jack Anderson is a journalist, as are some members of both of the groups of intervenor-defendants. Both of those groups also include historians and political scientists. The interest of journalists would seem to lie in the ability to review, report, and comment upon the materials in question with some immediacy. However, as one noted historian has remarked, the interest of members of his profession is quite different:

> The real interest of the historian is in a rich, honest and revealing record rather than in instant access; and the more he pushes for instant access, the more he will impoverish the record. . . . The certainty of immediate disclosure would have a chilling effect; and the result would be the degeneration of the research quality of documentary evidence.

Schlesinger, *Who Owns a President's Papers?*, 27 MANUSCRIPTS 178, 181 (1975).

assumed that Congress intended its regulatory scheme to conform to constitutional requirements. That general canon of construction, here reinforced by several distinct aspects of the Act,[15] will require the Administrator to make a considered judgment about the constitutionality of any regulatory scheme he adopts, for, as the Supreme Court has recently reminded us, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution." *United States v. Nixon*, 418 U.S. 683, 703 (1974).[16]

[15] There are a number of indications of congressional concern that this Act operate within constitutional bounds. In addition to the standard separability clause in subsection 105(b), these include (1) the express reservation in subsection 102(b) of the opportunity of any party to raise constitutional rights, privileges or defenses in resisting any legal process directed to the materials; (2) the reservation in subsection 102(c) of plaintiff's right of access to the materials; (3) the directive in subsection 104(a)(4) to consider the need to protect the right to a free and impartial trial; (4) subsection 104(a)(5), as has been discussed in text; and (5) the provision under subsection 105(c) of funds, if necessary, to compensate any individual found to have been deprived of private property.

[16] In his Reply Brief at 69 n.42, plaintiff raises for the first time the argument that one of the seven factors included in § 104(a)—specifically § 104(a)(1)—has underlying it the impermissible purpose of disclosure to the public of information concerning government processes. As a result, plaintiff asserts, any regulations resulting from consideration of that factor are constitutionally defective regardless of their substance. However, we find no reason to find that disclosure of information to the public is an improper purpose. It is one, to be sure, that may at some point collide with various constitutional protections involving privacy or confidentiality, but that is not an indication that it is *per se* impermissible, as plaintiff himself concedes elsewhere, *see* Reply Brief at 16-17. *See also* note 46 *infra*. Indeed, this purpose has been identified in numerous cases as the principal objective of the Freedom of Information Act, 5 U.S.C. § 552 (1970), with no indication

The legislative history suggests that Congress shared this view of the Administrator's duties. Senator Javits, one of the bill's three sponsors, had the following to say about the criteria of section 104(a):

> The criteria, Mr. President, endeavor to protect due process for individuals who may be named in the papers as well as any privilege which may be involved in the papers, and of course the necessary access of the former President himself.
>
> In short, the argument that the bill authorizes absolute unrestricted public access does not stand up in the face of the criteria and the requirement for regulations which we have inserted in the bill today.
>
> There will be no broad and unrestricted public access which could nullify the criteria to which I have referred.

120 CONG. REC. S 18244 (daily ed. Oct. 3, 1974). Senator Nelson, the bill's draftsman and principal sponsor, expressed the same view:

> The sixth principal provision concerns public access to the materials. A primary purpose here is to inform the American people of the full truth concerning the Watergate scandals. However, this purpose should not override all regard for the rights of the individual to privacy and a fair trial.

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that it has any constitutional infirmity. *E.g., Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17-18 and cases cited n.17 (1974); *EPA v. Mink*, 410 U.S. 73, 79-80 (1973); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974). Thus, the premise of impermissibility upon which this argument rests is fundamentally unsound, and that disposes of the issue without the need to consider the validity of the second part of the argument. *Cf.* Palmer v. Thompson, 403 U.S. 217 (1971); *compare* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, *with* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

Id. at S 18236. Senator Ervin, the third sponsor and the floor manager of the bill, was in agreement with this view.

> Nobody's rights are affected by this bill, because it provides, as far as privacy is concerned, that the regulations of the Administrator shall take into account . . . the opportunity to assert any legally or constitutionally based right which would prevent or otherwise limit access to the tape recordings and other materials.

Id. at S 18329. (daily ed. Oct. 4, 1974). *See also id.* at S 18320 (remarks of Sen. Ervin); *id.* at H 11209 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas).

Finally, in the event that a particular regulation, or an entire set of regulations, might be constitutionally defective, judicial review under Section 105(a) of the statute is available.[17] If a reviewing court were com-

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[17] Of course, Congress has interposed itself between the formulation of regulations and the possibility of judicial review of regulations that have become effective, by reserving a power in either House to disapprove within 90 legislative days regulations submitted to Congress. *See* § 104(b)(1). Moreover, it has stated that the Administrator may not issue any regulation or any change in a regulation if that regulation or change is disapproved by either House. § 104(b)(2). The validity of such a delegation by Congress to each House has never been authoritatively established, *see* Testimony of Antonin Scalia on H.R. 8231 & H.R. 3658 before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., Oct. 29, 1975; though were it thought to be unconstitutional, only §§ 104(b)(1), (2) would need to be invalidated. If Congress were to disapprove regulations that the Administrator believed necessary to afford adequate constitutional protections, the Administrator would find himself in a difficult dilemma. But even were he to decide that he would be obligated under § 104(b)(2) to adhere to disapproval by one House of Congress, that obligation would only delay, not defeat, the promulgation of an effective set of

pelled to invalidate challenged regulations, alternatives more consistent with constitutional requirements could thereafter be adopted.

It is for compelling reasons, therefore, that we limit our inquiry in this case. In particular, we decline to reach challenges based upon the alleged infringement of plaintiff's constitutional rights or privileges caused by the possible access to materials, after they have been processed, by members of the public.[18] The imposition

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regulations that protects constitutional rights. For if a reviewing court were to hold that a set of regulations, whose content was due in part to exercise of the power to disapprove delegated to a single House of Congress, were constitutionally defective, the Administrator at that point would presumably be free to draft regulations more protective of constitutional rights, ignoring any activity of a single House if a court had already found such activity to render regulations unconstitutional. Thus, even were we to assume that one House of Congress already has acted, *see* 121 CONG. REC. S 15803-08 (daily ed. Sept. 11, 1975), or will act, pursuant to a validly delegated power, to prevent the Administrator from adopting regulations necessary to protect constitutional rights, that would not argue for addressing any questions other than those to which we have limited ourselves.

[18] Subsection 102(d), provides that the materials falling within the scope of § 101 shall "at all times" be available to executive agencies or departments for "lawful Government use," an access right that is distinct from the public access to be provided under § 104(a). Broadly read, § 102(d) might be thought to authorize wholesale access by executive officials in the Federal Government for a wide range of purposes, some of which might lead, intentionally or unintentionally, to widespread circulation of materials within or without the executive branch. *See also* note 61 *infra*. We find no reason, however, to subscribe to such a reading. For all of the reasons provided in this part of the opinion, we believe that Congress must be viewed as having authorized only such access by executive officials as will not violate any of the constitutional rights or privileges of Mr. Nixon discussed below. To find otherwise would require us to strike down as invalid that subsection of

of restrictions on access by the public, or by anyone other than executive officials for particular purposes, for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications, could eliminate the basis for plaintiff's objections to public access.[19] Providing for the return to Mr. Nixon,

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the Act (though, in light of the separability clause and the lack of dependence of other aspects of the regulatory scheme on that provision, not the entire Act), a course we must eschew if possible. Because it is easy and sensible to read the words "lawful Government use" to include the notion of "Government use consistent with such law as derives from constitutional strictures," and because the legislative history does not counsel a contrary course, *see* pp. 24-25 *supra*, we endorse such a reading.

[19] There exists a basic set of donor-imposed access restrictions that was first formulated by Herbert Hoover, *see* Affidavit of Richard A. Jacobs, exh. A, and followed by Presidents Eisenhower, *see id.*, exh. F; Kennedy, *see id.*, exh. G; and Johnson, *see id.*, exh. I. Under this scheme the following materials would be restricted:

1) materials that are security-classified;

2) materials whose disclosure would be prejudicial to foreign affairs;

3) materials containing statements made by or to a President in confidence;

4) materials relating to the President's family, personal, or business affairs or to such affairs of individuals corresponding with the President;

5) materials containing statements about individuals that might be used to embarass or harass them or members of their families;

6) such other materials as the President or his representative might designate as appropriate for restriction.

President Franklin Roosevelt imposed restrictions very similar to numbers 1, 2, 4, and 5, and in addition restricted (a) investigative reports on individuals, (b) applications and recommendations for positions, and (c) documents containing derogatory remarks about an individual. Affidavit of William

pursuant to subsections 104(a)(5) and (7), of materials implicating his personal or political privacy rights could have similar effect. Because we believe such regulations fall plainly within the Administrator's authority, we find no need to adjudicate claims that such regulations could moot.[20]

What remains before us, then, is the question whether the process by which the materials will be reviewed and classified, leading to the imposition on various classes of them of whatever access restrictions are included in the regulations, is constitutional. All of the parties appear to agree that more or less comprehensive review by government archivists seems contemplated under the Act—processing much like that used to review the materials accumulated by presidential administrations, and deposited in presidential libraries, since President Franklin D. Roosevelt's time. *See* pp. 42-46 and notes 31-33 *infra*. In considering a comprehensive review process, however, we do not overlook the possibility that procedures might be adopted which would permit some deviation from reviewing each tape recording or document on a literally word-by-word basis. Without suggesting that the Constitution requires adoption of any of the following—a question about which we express no view—we note a variety of archival practices that might be adopted—either be-

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R. Emerson, July 22, 1975, exh. B. President Truman's restrictions were like those of Hoover, Eisenhower, Kennedy, and Johnson, except that he made no provision, like number 6 above, for restriction merely at his own instance. Affidavit of Richard A. Jacobs, exh. D.

See also note 52 *infra* (describing one restriction on public access contained in the Proposed Regulations).

[20] In Buckley v. Valeo, *supra*, the Court of Appeals for this Circuit faced a not dissimilar situation, and adopted a similar approach. *See* p. 93 *infra*.

cause expressly mandated by regulation[21] or merely as a matter of course—to limit any invasion of plaintiff's constitutionally protected interests by the screening process:

> 1. A practice of requiring archivists to make the minimal intrusion necessary to classify material. Identification by signature, the file within which material is found, general nature (as with diaries, or dictabelts serving the same function), a cursory glance at the contents, or other means could significantly limit infringement of plaintiff's interests without undermining the effectiveness of screening by governmental personnel. Participation by Mr. Nixon in preliminary identification of material that might be processed without word-by-word review would facilitate such a procedure.[22]

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[21] The commentary to § 105-63.401-2 of the Proposed Regulations, *supra* note 13, suggests that each individual document or tape will have to be processed "word-by-word." Were such a regulation to be placed into effect, and challenged in litigation, a court would then be forced to consider whether the phrase "word-by-word" is to be interpreted with a literalness that would preclude adherence to any of the three practices outlined in text. If it concluded that such preclusion was inescapable, it would then have to consider whether any of those practices is constitutionally required. Surely if the answer to the second inquiry appeared to be affirmative and called into question the constitutionality of the processing scheme, the court would be especially wary of adopting a literal reading of "word-by-word" that precluded following any of the three practices. But if in the final balance it found that a regulation actually in effect strictly mandated a processing scheme that did not provide adequate protection of plaintiff's constitutional rights, that would require invalidation of only a regulation rather than the Act itself.

[22] The Supreme Court has suggested the appropriateness of such procedures in related situations on at least two occasions involving claims by the Executive that confidential government documents are not subject to disclosure. In both cases, the Court noted the possibility that the Government might

2. A practice of giving Mr. Nixon some voice in the designation of the personnel who will review the materials, perhaps by selecting from a body of archivists approved by the government.

3. A practice of giving Mr. Nixon notice of all proposed classifications of materials and an opportunity to obtain administrative and judicial review of them, on constitutional or other grounds, before they are effectuated.[23]

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demonstrate by extrinsic evidence that certain material was privileged and that, in such cases, the material should not even be reviewed by a judge *in camera*. *See EPA v. Mink*, 410 U.S. 73, 92-94 (1973); *United States v. Reynolds*, 345 U.S. 1, 10 (1953). *See also* pp. 81-82 *infra*.

[23] The Proposed Regulations, *supra* note 13, do not expressly provide that Mr. Nixon be notified of archival decisions to open particular materials to public access, although they do expressly provide for publication in the Federal Register of other archival decisions, *see* §§ 105-63.401-2(h), .401-3. Nonetheless, we believe that the Act, the overall scheme established by the regulations, and basic notions of procedural fairness all suggest that some practice should, and in all likelihood will, be adopted by which Mr. Nixon may obtain notice of decisions to permit public access to materials.

Subsection 104(a)(5) expressly requires the Administrator to take into account "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." Because of the vast quantity of materials, it would be difficult for plaintiff to assert that privacy rights require restricting access to particular items when he may not recall even what items are included in the materials or be able to reconstruct their contents. It is true that subsection 102(c) of the Act gives him a right of access to the materials, but surely that access right becomes far more meaningful, insofar as it is designed to aid him in determining whether to challenge the treatment of particular items, if he has some way of knowing what items are about to be made public. Otherwise, either Mr. Nixon must have perfect recall of the materials, which is difficult to expect, or the

There is, of course, no certainty that regulations restricting public access or practices narrowly tailoring the screening process will be adopted. Were we to try to anticipate all possible constitutional questions, however, we would run the risk of rendering an advisory opinion as to some questions if such regulations or practices were ultimately adopted. For that reason, and in light of the Administrator's duty to draft regulations that scrupulously protect the constitutional rights of all parties concerned, we discuss below only questions directed toward the statute on its face and aspects of the screening process that, in their broadest outlines, we believe will necessarily be included in any processing conducted under a valid set of regulations.

III. Claims Relating to the Separation of Powers

Mr. Nixon asserts two different challenges to the operation of the Act that derive from separation of powers concerns. First, he argues broadly that the Act infringes the powers of the President and hence represents an unconstitutional invasion of the executive sphere by Congress. Second, he insists that the Act infringes his presi-

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risk must be run that he would be unable to assert his privacy rights before public access, in his view, had already violated them. Similarly, the scheme of administrative and judicial appeals, *see* § 105-63.401-4, provided in part to protect personal rights against infringement by archival decisions, is extremely difficult to employ when those decisions are unknown.

We believe, then, that Mr. Nixon's right to challenge particular archival decisions as respects his privacy interests is hardly a meaningful one without notification of decisions that might threaten those rights. We have little doubt that a workable arrangement can be devised whereby Mr. Nixon's interests are protected with no significant disruption of the review process, and we believe that the spirit of the Act and the regulations requires no less.

dential privilege as recognized by the Supreme Court in *United States v. Nixon, supra*

In asserting a broad separation of powers claim, plaintiff points to a number of decisions suggesting that the three branches of government are totally distinct and autonomous, and that the separation of powers doctrine bars actions by one branch that even indirectly impinge upon another. Plaintiff's Brief at 83-85, *citing Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935), *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933), *and Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201 (1928). *See also* Plaintiff's Brief at 95-96, *quoting Myers v. United States*, 272 U.S. 52, 167 (1926). Presidential control over the disposition of presidential papers is stated to be an essential incident of the conduct of the presidency, an incident sanctioned by past practice as well as necessity. Congressional interference with such control, so it is said, unconstitutionally infringes powers reserved to the executive branch.

Although the view that the separation of powers mandates three mutually exclusive branches, each entirely free from interference by the others, may once have been ascendant in the Supreme Court, it is inconsistent with the earliest formulations, as well as the most recent judicial and scholarly consideration, of the doctrine. Madison in THE FEDERALIST No. 47, reviewing the origins of separation of powers doctrine, stated that "[o]n the slightest view of the British constitution we must perceive, that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other." THE FEDERALIST 325 (J. Cooke ed. 1961). He continued by remarking that Montesquieu, the "oracle" always consulted on the subject, *id.* at 324,

> did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import,

> and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.

Id. at 325-36 (emphasis in original). Madison illustrated and supported this position by noting that in the state constitutions, "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Id.* at 327.

Madison's view was shared by Justice Story, who wrote:

> But when we speak of a separation of the three great departments of the government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.

I J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow ed. 1905).

The view espoused in the cases upon which plaintiff relies reflects a stiffly formal and mechanistic view of government, one that does not admit of the need for flexibility in our constitutional system to respond to changed circumstances, newly perceived needs, and practical exigencies. The modern view of separation of powers rejects the metaphysical abstractions upon which Mr. Nixon would rely, and reverts instead to a more pragmatic, flexible, functional approach. It was well elaborated in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

That excerpt was quoted approvingly most recently in *United States v. Nixon, supra*, at 707, in which the Supreme Court reiterated that "the separate powers were not intended to operate with absolute independence." *See also Youngstown Sheet & Tube Co. v. Sawyer, supra*, at 610 (Frankfurter, J., concurring) ("the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed.") That position has the universal endorsement of commentators. *See, e.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09 (1958); G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 400 (9th ed. 1975); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-30 (1965); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1387-91 (1974); Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 U.C.L.A. L. REV. 92-93 (1974).

We therefore decline to embrace plaintiff's archaic view of the separation of powers as requiring three airtight departments of government. This is not to say that we do not consider the preservation of executive autonomy to be an important concomitant of a system of separated powers. Rather, given the tension between the independence and interdependence of the three branches, separation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact of

an Act on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch. *See United States v. Nixon, supra*, at 711-12; *Ratner, supra*, at 92-95.

The only impairment of the Executive's ability to perform its duties that plaintiff alleges the Act would cause is the detrimental impact that disclosure of communications given to the President in confidence would have on the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking. The need for protection of such confidentiality, as deriving from the separation of powers, was recognized by the Supreme Court in *United States v. Nixon, supra*, at 708, in the form of a qualified privilege for certain executive communications. Both the Supreme Court and the court of appeals in this circuit, however, refused to recognize an absolute privilege, *id.* at 705-07; *Senate Select Comm. v. Nixon*, 498 F.2d 725, 729-30 (D.C. Cir. 1974) (en banc); *Nixon v. Sirica*, 487 F.2d 700, 712-16 (D.C. Cir. 1973) (en banc) (per curiam), instead analyzing with precision in each case how to accommodate the confidentiality protected by a qualified privilege to competing needs of other branches. The contrasting results of *United States v. Nixon* and *Nixon v. Sirica*, on the one hand, finding the needs of the grand jury to be paramount to the protection of executive confidentiality, and *Senate Select Committee*, on the other, finding that Committee's needs insufficiently compelling to justify an inroad on executive confidentiality, illustrate the need for particularized analysis rather than mechanistic formalism in resolving disputes between separate but interdependent branches.

Although Mr. Nixon denominates his claim as one of presidential rather than executive privilege, we do not assign any significance to semantic distinctions of this

kind in the context of the case at bar. What we have before us is a claim of privilege to protect the generalized interest in free and candid communication to the President in the formulation of executive policy.[24] This is the same privilege recognized in *United States v. Nixon*, *Nixon v. Sirica*, and *Senate Select Comm. v. Nixon*.[25] The questions we face are who can assert that privilege, how to define its scope, and how to gauge its force when compared to competing considerations.

Mr. Nixon's claim of privilege could be easily disposed of were we to hold that only an incumbent President may assert a privilege to protect presidential confidentiality, even as to communications that took place

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[24] Plaintiff's argument suggests that "executive privilege" relates to the need to protect secret information involving military and foreign affairs and national security, and can be asserted by the incumbent alone, whereas "presidential privilege" is designed to protect the generalized interest in confidentiality of all communications relating to executive decision-making, and can be asserted only by the individual who was President at the time of the communications. Plaintiff's Brief at 117-20. This case presents no problem concerning secret information pertaining to national security, and thus, like the Supreme Court in United States v. Nixon, *supra*, at 710-11, 712 & n.19, we express no view on the relevance to that problem of anything in this opinion. As to what plaintiff terms "presidential privilege," by calling it "presidential" rather than "executive" he in no way answers the open question as to whether a former President may assert such a privilege; semantic games do not decide difficult questions. In what follows, we refer to the privilege in question interchangeably as "executive" and "presidential."

[25] Thus, we have no occasion to consider the extent to which the constitutionally-based executive privilege recognized in United States v. Nixon, or, to the extent it is distinct, any common law privilege protecting executive confidentiality, encompasses confidential communications involving executive officials other than the President. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-54 & n.17 (1975), and cases cited.

during prior administrations. Since President Ford has signed the legislation and, far from presently asserting that the processing scheme contemplated by the Act is invalid, his administration is before us defending it, the privilege protecting presidential confidentiality arguably could not be the basis for invalidating the Act.[26] That position has much to commend it. Invocation of executive privilege reflects a determination of where the public interest lies, which in turn requires full awareness and consideration of all the desiderata militating both for and against disclosure in a particular situation. The incumbent President alone is charged with the duty under the Constitution to make such a determination as part of his obligation to execute the laws, *Sun Oil Co. v. United States*, 514 F.2d 1020, 1027 (Ct. Cl. 1975) (Nichols, J., concurring), and he alone has the requisite knowledge of all facets of the problem and the unique perspective necessary to such a decision. 87 HARV. L. REV. 1557, 1565 (1974). It is for this reason that the analogous principle has been established, in both cases involving a privilege shielding the executive from the need to disclose secret information and cases involving a privilege shielding the generalized interest in executive confidentiality, that only the head of the department involved, and not his subordinates, may invoke the privilege. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Committe for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793-94 (D.C. Cir. 1971) (per curiam) (by implication); *Mitchell v. Bass*, 252 F.2d 513, 516 (8th Cir. 1958); *Overby v. United States Fidelity and Guaranty Co.*, 224 F.2d 158, 162-63 (5th Cir. 1955). Furthermore, if the incumbent is not

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[26] The incumbent would, of course, retain the right to assert executive privilege in order to prevent public access to any materials whose disclosure he believed would undermine executive confidentiality and would not be in the public interest.

asserting privilege, there is little chance that disclosure would obstruct the ongoing formation and implementation of executive policy. *See* Cox, *supra*, at 1410 (by implication). Similarly, the incumbent has an interest in preventing disclosure of the confidences of predecessor administrators when he believes the effect will be to discourage candid presentation of views by his advisors; if he fails to raise a claim of privilege, surely the risk of impairing necessary confidentiality is attenuated.

In addition, to the extent that executive privilege is designed to shield executive officials, whose energies are and must be fully devoted to the vast governmental problems which they confront, from burdensome requests for information, *see United States v. Nixon*, *supra*, at 714, *quoting United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807) (privilege serves as a "'guard'" furnished to the President "'to protect him from being harassed by vexatious and unnecessary subpoenas'"); Cox, *supra*, at 1385; *cf. Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 501-03 (1975); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (per curiam), a former President is in much less need than an incumbent.[27] Finally, an incumbent President, . re-

[27] There is a distinct question of the President's immunity from legal process, which more directly relates to the problem of vexatious demands for information, *See, e.g.*, Nixon v. Sirica, *supra*, at 708-12; G. GUNTHER, *supra*, at 457-59, 466-68; Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 19 (1974); Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30, 33-34 (1974). The Supreme Court in United States v. Nixon failed to keep this issue distinct from the question of the proper scope of executive privilege. *See* 418 U.S. at 705-07; Gunther, *supra*, at 33-34; Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 U.C.L.A. L. REV. 76, 80 (1974). In light of the special circumstances of that case, we do not draw great significance from such a

sponsible to the electorate for his actions and subject to the political restraints of a continuing readjustment with Congress, is less likely to succumb to the temptation to abuse his authority to claim privilege. *See, e.g.*, Cox, *supra*, at 1430-32; Henkin, *Executive Privilege; Mr. Nixon Loses but the Presidency Largely Prevails*, 22 U.C.L.A. L. REV. 40, 43 (1974); Sofaer, *Book Review*, 88 HARV. L. REV. 281, 288-89, 292-94 (1974); Winter, *Book Review*, 83 YALE L. J. 1730, 1740-43 (1974); 87 HARV. L. REV. 1557, 1565 (1974). Mr. Nixon's voluntary disclosure, while in office and after great pressure had been exerted, of materials which he believed to be privileged, *see* 10 Weekly Comp. of Pres. Docs. 449, 450-58 (May 6, 1974), indicates that the political check on an incumbent is more than academic.

Several judicial pronouncements have held or suggested that a former President may not claim executive privilege. *See Sun Oil Co. v. United States*, *supra*, at 1027 (Nichols, J., concurring); Order and Memorandum of September 24, 1975 in *Halperin v. Kissinger*, Civil No. 1187-73 (D.D.C., filed June 14, 1973), at 1-2. At least one other has taken a contrary view. *See* Order of March 26, 1975 in *Apton v. Wilson*, Civil No. 798-72, (D.D.C., filed Apr. 24, 1972) *and Kuhn v. Wilson*, Civil No. 956-71 (D.D.C., filed May 13, 1971) (consolidated cases).[28]

merger. However, the clear holding in United States v. Nixon, *supra*, at 705-07 that the President is not immune from judicial process—the same holding that the court of appeals in this circuit had earlier made in Nixon v. Sirica, *supra*, at 708-12—does suggest that to the extent any weight is to be given to a President's need to avoid vexatious demands for information, the only pertinent doctrine now available is that of executive privilege.

[28] The principal argument in favor of permitting a former President to retain authority to assert presidential privilege is that political partisanship might prevail over determination of the public interest were an incumbent administration alone to have the ability to assert privilege. Executive confi-

We do not believe that we must align ourselves with one or the other of these views. *See Sun Oil Co. v. United States*, *supra*, at 1025. For even assuming *arguendo* that Mr. Nixon may, as a former President, assert executive privilege, such a claim is not as forceful as one raised by an incumbent. All of the reasons militating against permitting a former President to assert privilege without the support of the incumbent suggest, at the least, that if he is to be allowed to do so, such a claim carries much less weight than a claim asserted by the incumbent himself.

It is this less forceful claim that we consider as the basis for Nixon's challenge to the screening process by which the estimated 42,000,000 pages of documents, *see Hearings on GSA Regulations Implementing Presidential Recordings & Materials Preservation Act before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. at 83 (1975) [hereinafter cited as *Senate Hearings on GSA Regulations*], 880 tape recordings, *see id.* at 89, and other materials, *see id.* at 92, falling within section 101 of the Act will be reviewed. This claim quite plainly does not attach to all of these items, as Mr. Nixon concedes. *See* Plaintiff's Brief at 98. He estimates that he saw no more than 200,000 of the documents involved, Nixon Deposition at 15-16, and it is uncertain to what extent the privilege protecting presidential confidentiality recognized in *United States v. Nixon* attaches to materials he never saw.[39] In any event, like all privi-

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dentiality would consequently be inadequately protected, and thus the ultimate purpose of the privilege—to encourage free and open communication by executive officials—would be undermined.

[39] The answer to this question would depend upon at least two distinct factors: First, the extent to which confidential executive communications not involving *presidential* decision-making are privileged, *see* note 25 *supra*, and second, whether

leged communications, any communications here protected "must originate in a *confidence* that they will not be disclosed." 8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961) (emphasis in original). Moreover, as *United States v. Nixon* suggests, the privilege is limited to communications "in performance of [a President's] responsibilities," 418 U.S. at 711, "of his office," *id.* at 713, and "in the process of shaping policies and making decisions," *id.* at 708. *See Nixon v. Sirica*, *supra*, at 717 ("in the President's performance of his official duties"); Cox, *supra*, at 1411 n.106; *cf. Eastland v. United States Servicemen's Fund*, *supra*, at 501 (immunity of legislators deriving from the Speech and Debate Clause encompasses actions within the " 'sphere of legitimate legislative activity' "), and cases cited. Undoubtedly, some of the 200,000 documents Mr. Nixon himself saw, as well as many of the others and significant portions of the tape recordings, are not related to the discharge of presidential duties and hence fall outside the scope of this protection. Moreover, a strong argument can be made that as to some of the materials encompassed by the Act and related to presidential duties, prior disclosures by Mr. Nixon, *see* 10 Weekly Comp. of Pres. Docs. 997, 1008-09 (Aug. 3, 1974); 10 *id.* 449, 450-58 (May 6, 1974); H.R. REP. NO. 93-1305, 93d Cong., 2d Sess., at 191-205 (1974), constitute a waiver of any privilege, *see* 8 J. WIGMORE, *supra*, §§ 2327-29; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 93 (2d ed. E. Cleary 1972); MODEL

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the privilege that attaches to presidential communications extends to communications never directly received by the President but rather channelled in a variety of ways to him or his advisors. However, since in our view there would be no constitutional infirmity in the statute even if a large proportion of the materials falling within the Act were thought to be protected by an executive privilege, we need not further consider these issues.

CODE OF EVIDENCE rule 231(b) (1942); UNIFORM RULES OF EVIDENCE rule 510 (1974); 87 HARV. L. REV. 1557, 1566-68 (1974), a factor that the court of appeals in this circuit believed to be relevant in judging the relative weight of the competing claims of the grand jury and the President in *Nixon v. Sirica*, *supra*, at 717-18.

Thus, the executive privilege issue reduces to the following: insofar as a claim of privilege by Mr. Nixon has force as to some of the materials covered by the Act, how serious an intrusion on executive confidentiality will screening by government archivists necessarily be, and do the objectives served by the Act justify that intrusion? Once the issue is properly framed in this fashion, we believe the answer to it is relatively easy.

The intrusion on executive confidentiality that review of the materials by government archivists would constitute is, in our view, at most minimal. For that confidentiality is not absolute over time, but rather begins to erode after an administration leaves office.[30] Presidents

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[30] In a recent English case, Lord Chief Justice Widgery was presented with an action by the Government to restrain publication of the diaries of former Cabinet Minister Richard Crossman, in order to protect the confidentiality of communications involving Cabinet Ministers. In deciding against the Government and in favor of publication, the Lord Chief Justice indicated that, in his view, the need for protection of such confidentiality diminishes over time:

> It may be that in the short run (for example, over a period of weeks or months) the public interest is equally compelling [as in cases involving national security] to maintain joint Cabinet responsibility and the protection of advice given by Civil Servants, but I would not accept without close investigation that such matters must, as a matter of course, retain protection after a period of years.
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> . . . .
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> There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.
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> . . . .
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> The court should intervene only in the clearest of cases where the continuing confidentiality of the material can be demonstrated.

Attorney General v. Jonathan Cape Ltd., (Q.B. Oct. 1, 1975), *reported in* London Times, Oct. 2, 1975, at 8, col. 1. The British Government has announced that no appeal will be taken. New York Times, Oct. 10, 1975, at 2, col. 4.

Mr. Nixon could be thought to agree with this view in its broadest form, for he indicated in his deposition that he believed that the 50-year restriction that President Johnson imposed upon access to the tape recordings he made while in office, *see* Affidavit of Mildred Stegall at 2, was "too long." Nixon Deposition at 53-54.

It is also interesting to note that Franklin D. Roosevelt, while indicating that some restrictions on public access might stay in effect as long as 50 years, stated that restrictions of an average length of 10-15 years should suffice. Affidavit of William R. Emerson, July 22, 1975, exh. A.

and advisors are likely to write memoirs or to engage in public reminiscences disclosing communications that once were confidential. *See* Intervenor-Defendants' Joint Memorandum at 132-37. Indeed, Mr. Nixon, like Lyndon Johnson before him, *see* Affidavit of Mildred Stegall at 1-2, established a taping system precisely to aid him in preparation of his memoirs, *see* Nixon Deposition at 72-73, a project for which his plans were known while in office, Nesbitt Deposition at 10, 58-60. Every President since Herbert Hoover has deposited presidential papers in presidential libraries, *see Senate Hearings on GSA Regulations* at 105, 246-47; Affidavit of Daniel J. Reed at 1, an example Mr. Nixon says he intended to follow, *see* Nixon Affidavit at 17-18; *see also* Affidavit of Richard A. Jacobs at 7-8. Over time, access restrictions have been removed from most of the materials on deposit, affording members of the public access to communications that,

at the time they were made, were confidential.[31] Hence, there has not been any practice of permanently preserving executive confidentiality in recent decades. On the contrary, in an era when both executive responsibilities and the quantity of presidential papers were increasing,[32] every President since the establishment in 1934 of the

[31] In the Hoover Library, there are no restrictions on presidential papers, although some restrictions exist with respect to personal and private material. Letter of July 17, 1975 from Thomas T. Thalken, Director of the Hoover Library, to R. Stan Mortenson, at 1. In the Roosevelt Library, less than 0.5% of the materials are restricted. Affidavit of William R. Emerson, July 23, 1975, at 2. There is no evidence in the record as to the percentage of materials currently under restriction in the Truman or Eisenhower Libraries. In the Kennedy Library, 85% of the material has been processed, and of the processed materials, only 0.6% is under donor (as distinguished from security-related) restriction. Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson, at 3. In the Johnson Library, review of nonclassified material for Johnson's presidential period has been virtually completed, and more than 99% of all non-security classified materials are unrestricted. Affidavit of Harry J. Middleton at 3.

In each of the presidential libraries, provision has been made for the removal of restrictions when the passage of time has eliminated the circumstances originally thought to require imposition of restrictions. *See* Affidavit of Richard A. Jacobs, exhs. A, D, F, H, I; Affidavit of William R. Emerson, July 22, 1975, exh. B; Affidavit of William R. Emerson, July 23, 1975, at 2.

[32] The various presidential libraries contain the following numbers of pages of documents from the presidential period: for Hoover, 1 million; for Roosevelt, 10.5 million; for Truman, 5.8 million; for Eisenhower, 11 million; for Kennedy, 13 million; and for Johnson, 17 million. Affidavit of Daniel J. Reed at 2. These figures, especially when adjusted for the number of years each President was in office, reveal both the pattern of increase and the huge gap between Mr. Nixon's 42 million pages of documents and the number of pages of any of his predecessors.

National Archives (and Herbert Hoover as well) has turned over presidential papers for governmental preservation and eventual disclosure.

Perhaps most important, the screening process uniformly employed in these libraries—and therefore the practice that present executive officials would likely expect—involves comprehensive review by archivists of the materials on deposit, including those upon which access restrictions are ultimately imposed.[33] We would have trouble under any circumstances finding that mere screening by archivists, whose record for discretion in handling confidential material is unblemished, *e.g.*, Affidavit of William R. Emerson, July 23, 1975, at 2-3; Affidavit of Harry J. Middleton at 2; Affidavit of John Stewart at 3-4, substantially infringes executive confidentiality, especially in light of the practices that might be adopted, *see* pp. 28-30 *supra*, to limit the intrusiveness of review. *Cf. United States v. Nixon*, *supra*, at 706 (finding it "difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection

[33] *See* Affidavit of Richard A. Jacobs at 3, 4-5, 5-6, 8 & exhs. A, D, F, G, & I; Affidavit of William R. Emerson, July 23, 1975, at 1-2; Affidavit of William R. Emerson, July 22, 1975, at 2-3; Affidavit of Daniel J. Reed at 2-3; Affidavit of John Stewart at 3-4; Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson, at 3.

It is true that past Presidents who have deposited materials in presidential libraries have typically removed from the materials deposited, or placed under seal, a few materials which they did not wish even archival personnel to view. But these exclusions have typically centered not on materials involving confidential government decisionmaking, but rather on materials involving personal, political, family, and business affairs. *See* note 54 *infra*.

with all the protection that a district court will be obliged to provide"); *Sun Oil Co. v. United States, supra,* at 1024. But when that very process is one that must fairly have been anticipated by executive officials in the Nixon administration, the argument that such screening is likely to stifle free and open communication in the future loses virtually all weight whatsoever.

There was, moreover, adequate justification for the congressional decision to entrust custody of the documents and the responsibility for their screening to GSA rather than Mr. Nixon. Chief Executives are not by nature professional archivists, and they lack expertise as to what materials may prove to be of historical value. *See* H.R. REP. No. 93-1507, 93d Cong. 2d Sess., at 6 (1974) (*quoting* Franklin D. Roosevelt):

> [Presidential material] should be kept in one place and kept in its original form because Presidential papers and other public papers have been culled over during the lifetime of the owner, and the owner has thrown out a good deal of material which he personally did not consider of any importance which, however, from the point of view of factual history, may have been of the utmost importance.

Review of materials such as these requires both enormous expertise and enormous manpower, *see Senate Hearings on GSA Regulations* at 12-13, 90-132, and Congress could legitimately wish to establish regularized procedures to ensure that the process by which the materials would be reviewed would be adequate to the task. Congress might also have been concerned that those entrusted with reviewing such materials be not only expert, *see* Affidavit of Daniel J. Reed at 2-3, but disinterested. Any former President is virtually certain to be concerned with the light in which history will view the record of his tenure. His quite natural hope is that his conduct will be viewed with favor, and if he were to possess unbridled control

over the papers of his administration—the raw materials from which historical judgments will be fashioned—there is always some risk that those items that might paint a different picture from the one he would like to portray will be subject to destruction or alteration, or otherwise unavailable to various government agencies and members of the public.

That risk might rationally be thought by Congress to be considerably magnified by reference to the circumstances surrounding Mr. Nixon's departure from office. The investigations conducted by the House Judiciary Committee (culminating in a recommendation that Mr. Nixon be impeached), the Watergate Special Prosecution Force, and the Senate Select Committee on Presidential Campaign Activities, and the substantial evidence they brought forth which might reasonably have been thought by Congress to suggest that there was misconduct on the part of Mr. Nixon and his close associates, are too familiar and too well-recorded elsewhere to merit elaboration by us. *See* H.R. REP. No. 93-1305, 93d Cong., 2d Sess. (1974); S. REP. No. 93-981, 93d Cong., 2d Sess. (1974); Watergate Special Prosecution Force, *Report,* [hereinafter WSPF *Report*] Oct., 1975, and sources cited 265-73. The temptation to distort or destroy the historical record might be thought by Congress to be less resistible in the event that the materials provided some foundation for allegations that misconduct took place.[34] Without

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[34] It is instructive to note the fate of the papers accumulated during the administration of Warren Harding, whose presidency was marked by the Teapot Dome affair, a highly publicized political scandal which, at least in terms of notoriety, was not unlike Watergate. After Harding's death while in office, the papers were packed and stored. Mrs. Harding undertook to remove and examine the "Private Office" material, and "[h]er objective seems to have been the destruction of any material which might have proven harmful to the memory of her husband." She burned some papers while they

indicating any view about the accuracy of these or any other allegations, we believe that Congress had before it an adequate basis for concluding that responsible processing of the materials in accordance with important public interests could be better ensured if the materials were entrusted to government archivists.[35]

The simplest way of describing the public interests served by the Act is to merge all of them under the

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were still at the White House. After the remainder were shipped to Ohio, Mrs. Harding "alternately designat[ed] individual items or entire folders for destruction. . . ." "The amount [sic] of files destroyed by Mrs. Harding cannot be accurately ascertained; though gaps in the file numbers of the private office papers do indicate that she may have burned as much or more than half the material available to her." Lentz, *The Warren G. Harding Papers*, at 2-3 & n.3 (Ohio Historical Society, Columbus, Ohio 1970).

The presidential papers of Presidents Pierce, Arthur, and Coolidge may have suffered from destruction initiated or authorized by these Presidents. McDonough, *Who Owns Presidential Papers?*, 27 MANUSCRIPTS 2, 5 (1975).

[35] Mr. Nixon suggests in his Reply Brief at 5 that if Congress' real concern were preservation of the materials from destruction, legislation could have been more narrowly tailored merely by prohibiting Mr. Nixon or anyone else from destroying any materials. We believe this argument misses the point. To begin with, Congress might legitimately have entertained doubts about whether Mr. Nixon would not violate such a prohibition. Moreover, placing the materials in custody not only insures against destruction—it also is the predicate to establishing a certain and effective review process to classify the materials, and to the extent that is permitted constitutionally, to provide access to them. A law that prohibited destruction and mandated government custody to ensure safekeeping, but nothing more, would not adequately serve congressional objectives, for those objectives are broader than mere prevention of destruction, and as we proceed to discuss, depend upon eventual access to particular materials by various government agencies or members of the public.

rubric of preservation of an accurate and complete historical record. Although such a characterization is justifiable, it belies the multiplicity of ways in which preservation serves vital national interests. Two interests in particular seem to us to be of special importance and plainly to be furthered by the Act, even were restrictive controls on access by the general public imposed by regulation.

First, and most broadly, the Act serves the national interest by preserving materials upon which historians must draw in order accurately to recount and to judge the political history of our time. *See, e.g.*, S. REP. No. 93-1181, 93d Cong., 2d Sess., at 1, 3 (1974); H.R. REP. No. 93-1507, 93d Cong. 2d Sess., at 2, 3, 8 (1974); *Senate Hearings on GSA Regulations* at 256; 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18235 (daily ed. Oct. 3, 1974); *id.* at S 18248 (remarks of Sen. Ervin); *id.* at S 18259 (remarks of Sen. Huddleston); *id.* at S 18260 (remarks of Sen. Ribicoff); *id.* at S 18261 (remarks of Sen. Muskie); *id.* at S 18325 (daily ed. Oct. 4, 1974) (remarks of Sen. Nelson); *id.* at H 11207 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas). *See also* sections 101(b)(1), 104(a)(7) of the Act.[36] Moreover, the Act may provide a scheme by which the materials are not only preserved, but may be screened promptly and professionally to ensure that when materials become available to public access, they will be readily usable. *See generally, e.g., Hearings on GSA Regulations* at 1-232. Congress might prop-

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[36] As of June 30, 1975, the Roosevelt library had issued 5,009 research passes, each valid for one year. Some 222 of the researchers using these passes were representatives of the media or employees of local, foreign, or the Federal governments. The remainder were scholars, students, writers, genealogists, and other researchers. Affidavit of William R. Emerson, July 22, 1975, at 3. Plainly, then, the Roosevelt library has been widely used for historical purposes.

erly have shared the sentiment of Harry S. Truman that is inscribed at the entrance to the library housing the presidential papers of his administration:

> This library will belong to the people of the United States. My papers will be the property of the people and be accessible to them. And this is as it should be. The papers of the Presidents are among the most valuable sources of material for history. They ought to be preserved and they ought to be used.

Whistle Stop: The Harry S. Truman Library Institute Newsletter, Vol. 3, No. 2, Spring, 1975, at 1.[37] It would serve little purpose to recount all of the ways in which the ability of a nation's citizens to understand their past enriches their lives and helps them to evaluate and perhaps to shape the present and future.[38] It should suffice

[37] President Truman is not the only former Chief Executive to recognize the importance of this need. *See* note 53 *infra*. Indeed, Mr. Nixon himself has stated that he believes the materials at issue to be of great importance to future historians:

> A. [Mr. Nixon] . . . My reason for approving [the tape recording system in presidential offices] was primarily because of the historical significance. I knew of it, particularly in the foreign policy area, of the conversations that were taking place and I felt having those conversations taped for purpose [sic] of history would be very, very useful and that it [sic] why it was done.
>
> Q. That was the reason?
>
> A. That was my primary motivation.

Nixon Deposition at 72-73.

[38] Senator Huddleston expressed one view as follows:

> There is a maxim which says we should learn from history in order not to repeat our mistakes. However, if one man is allowed to selectively edit a substantial portion of our history at his own discretion we may very well be destined to repeat our mistakes, only on a grander scale next time. This is why it is extremely vital that we provide the means for settling this matter as soon as possible.

120 CONG. REC. S 18259 (daily ed. Oct. 3, 1974).

to say that promotion of such understanding could hardly be more integral to a society based on democratic prin-

The distinguished English historian J. H. Plumb has recently discussed with eloquence the uses of history:

> There has so far always been a need in human societies to possess a sense of worth and of value. This, of course, may be provided in non-historical ways. . . . Some men and women can derive it from the richness of their own instinctive lives. . . . The majority of men and women, however, need the dimension of time because they are conscious of it. They realize that they are part of an historical process that has changed over the centuries, that time for men and women and their societies can never be static, or at least has never been static; that the process of change has accelerated and is accelerating so that they require to know what the nature of this process has been and is. They need an historical past, objective and true.
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> . . . .
>
> It is not only necessary to discover, as accurately as the most sophisticated use of evidence will allow, things as they actually were, but also why they were so, and why they changed; for no human societies, not one, have ever stood still. Although we carry within ourselves and within our societies innumerable relics of the past, we have discarded, outgrown, neglected and lost far more. . . . The historian's purpose, therefore, is to deepen understanding about men and society, not merely for its own sake, but in the hope that a profounder knowledge, a profounder awareness will help to mould human attitudes and human actions.

J. PLUMB, THE DEATH OF THE PAST 16, 105-06 (1970). *See also* Judge Gasch's Memorandum-Order of April 23, 1975 in Don't Tear It Down, Inc., v. GSA, Civil No. 74-381 (D.D.C. filed Mar. 4, 1974), at 10-11, *reported in* 103 DAILY WASH. L. REP. 1921, 1925 (Nov. 11, 1975).

ciples and devoted to freedom of expression in the political sphere as well as others.[39]

Second, preservation of these materials is needed to ensure their availability for successive administrations engaged in policymaking. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess., at 3, 4, 5 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess., at 3 (1974); 120 CONG. REC. H 11211 (daily ed. Dec. 3, 1974) (remarks of Rep. Abzug). *See also* section 102(d) of the Act. Govern-

[39] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) ("Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records. . . ."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969) ("the First Amendment goal of producing an informed public capable of conducting its own affairs"); Buckley v. Valeo, *supra*, 519 F.2d at 867; Attorney General v. Jonathan Cape Ltd., *supra* note 30 (permitting publication of confidential diaries of a British Cabinet Minister serves the "public interest" in "freedom of speech"); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57.

mental programs and policies do not expire every four or eight years; the information and lessons gained from past experience do not evaporate the moment a new President is inaugurated. In both the first presidential transition, from George Washington to John Adams, and the most recent transition following Mr. Nixon's resignation, as well as in many others, the importance of this need has been recognized by making some provision for continued access to documents of the outgoing administration.[40] That practice has not, to be sure, been uniform,

[40] When George Washington left office, he employed two men who had served as his secretaries

> to separate from his papers those files which were intended for his successor in office, John Adams, and to pack and send the remainder to Mount Vernon. It was later discovered, as the result of a request from Attorney General Charles Lee, that two bundles containing original opinions of the Heads of Departments were still in the possession of the Secretary of State, who had borrowed and failed to return them. He promptly made arrangements for their return.

Index to the George Washington Papers, Library of Congress, Manuscript Division, at vii (1964).

Julian P. Boyd, the editor of the Thomas Jefferson papers, in his Affidavit at 2-3 stated that Jefferson never explained the principle underlying his practice in disposing of papers, but described that practice as follows:

> During his two terms as President, Jefferson was extremely meticulous in depositing in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of the public business or being in any sense official in nature. As a result, the vast bulk of records of an official nature generated during Jefferson's presidency are still to be found in the various departmental record groups in the National Archives.

There are several more recent examples of such a practice. After Franklin Roosevelt's death during World War II,

but that nonuniformity may only reinforce the validity and cogency of a congressional view that records of past executive policymaking ought to be preserved so that future administrations can have ready access to them and a desire to institutionalize arrangements conducive to such a practice. There are numerous examples in the record of incumbent administrations having to apply to presidential libraries for permission to examine records of past government actions that relate to current gov-

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it was clearly essential that materials relating to the war effort remain available to the Truman administration. Pursuant to an agreement between Truman and the executors of Roosevelt's estate, the so-called Map Room papers remained in government custody until the Executive no longer had need for them. Affidavit of William R. Emerson, July 22, 1975, exh. C. When President Johnson suddenly assumed office after the assassination of John F. Kennedy, "it was deemed necessary to retain most of President Kennedy's files at the White House for the time being for use by the Staff." Affidavit of William J. Hopkins at 12. More than 18 months after that transition, the executors of President Kennedy's estate expressly indicated that the Archivist of the United States was authorized to make available to President Johnson any materials needed by him in the performance of his duties as President. Affidavit of Richard A. Jacobs, exh. H. Most recently, when Mr. Nixon left office, all originals of virtually all papers, *see* note 1 *supra*, were boxed for shipment, but staff members were to make copies of documents necessary for continuity in government. Nesbitt Deposition at 40. *See also* Nixon Deposition at 130, 134-36 (conceding that various materials may aid continuity in government, but suggesting that a former President must control them to preserve executive confidentiality). *See also* note 53 *infra*.

It is no doubt true that the need for retention of records is most critical during wartime or after a sudden change in administration. That does not indicate, however, that the need is not great in ordinary times.

ernment problems [41]—permission that has not uniformly been granted.[42] We agree with the assessment of this state of affairs made by Arthur Schlesinger, Jr.:

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[41] Evidence in the record establishes that numerous requests have been made by officials of incumbent administrations for access to materials housed in presidential libraries. It is uncertain and perhaps doubtful that the record reflects all requests, formal or informal, that have been made, nor it is always clear whether particular requests were pursued and ultimately fulfilled. Although the preponderance of requests have related to foreign affairs, a not insignificant number have involved domestic policy. The requests made have related to such diverse topics as ongoing policymaking in the field of foreign affairs; preparation of historical accounts by the State Department, CIA, military, and Atomic Energy Commission; a New Deal dam project; pending litigation involving the Federal Government; and the funding of the Kennedy Center.

For the relevant evidence, *see* Affidavit of John S. D. Eisenhower at 7-8; Affidavit of Daniel J. Reed, exh. D, at 79; Affidavit of John Stewart at 2-3; Deposition of Jack Nesbitt at 72; Letter of July 23, 1975 from William R. Emerson, Director of the Roosevelt Library, to R. Stan Mortenson, at 2; Affidavit of William R. Emerson, July 22, 1975, at 3 & exhs. D, E, G, H, I, K, L, M, N, O, P, T, U; Letter of July 18, 1975 from John E. Wickham, Director of the Eisenhower Library, to R. Stan Mortenson, at 1. *See also* Affidavit of Jeanne W. Davis at 5-6.

There have already been a number of requests for materials from the Nixon administration. *See* Letter of July 29, 1975 from R. Stan Mortenson to Andrew Krulwich, and attachments thereto.

[42] The only incident of this nature plainly established in the record occurred during President Kennedy's administration. One of the issues in American foreign relations at that time was providing assurances to France that the United States' nuclear deterrent was reliable. In expressing doubts about such reliability, the French Government alleged that during the 1956 Suez Crisis the United States had failed to

> No President should ever have to apply to the library of one of his predecessors, as President Kennedy had to apply to the Eisenhower Library in 1962 to find the memorandum of a presidential conversation with an English Prime Minister, or as President Johnson had to apply to the same library in 1967 for presidential correspondence with a Prime Minister of Israel.

Schlesinger, *supra* note 14, at 180. Precedent as old as Justice Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342, 347 (No. 4901) (C.C.D. Mass. 1841), and as recent as the 1974 Opinion of the Attorney General on ownership of presidential papers, 43 OP. ATT'Y GEN. No. 1 (Sept. 6, 1974), at 5-7, has recognized the importance of this need, as did Congress with respect to executive records generally, rather than presidential materials specifically, when it enacted the Federal Records Act of 1950, 64 Stat. 583, *codified in* 44 U.S.C. §§ 2101 *et seq.* (1970). We believe Congress could legitimately believe it impor-

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support France and Britain after the Soviet Union had threatened a nuclear attack if the Suez operation continued. C. Douglas Dillon, Ambassador to France in 1956 and later Secretary of the Treasury, contended that the French allegations were inaccurate and sought to find a telegram he sent to Washington in 1956 indicating that he had provided firm assurances to France. After failing to locate it in State Department files, officials of the Kennedy administration requested John S. D. Eisenhower—the former President's son and the individual in charge of his papers—to search for the telegram in question. Mr. Eisenhower had doubts that that request truly involved national security, *see* Affidavit of John S. D. Eisenhower, exh. B, and responded that the request would be honored only if made personally by Secretary of Defense McNamara to President Eisenhower. McNamara decided, in light of the need to preserve cordial relations with President Eisenhower and to minimize the number of requests for materials, not to pursue the matter and to rely merely upon Mr. Dillon's recollection. Affidavit of Paul H. Nitze, at 2-6. *Cf.* pp. 95-96 & note 68 *infra*.

tant to legislate, as it did, to ensure that this need is served by a regularized and certain procedure.[43]

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[43] Plaintiff asserts a number of challenges to the legitimacy or importance of this interest as a basis for upholding the Act, all of which we believe are without merit. First, he argues that this purpose was not considered by Congress and is nothing more than a *post hoc* rationalization. Plaintiff's Reply Brief at 7. Even were we to assume that a court is foreclosed from considering purposes mentioned in litigants' briefs but not in the legislative record, an issue about which we express no opinion, *see generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 43-47 (1972), that would be beside the point, as there is ample evidence in the legislative record, cited above in text, that this purpose was considered in Congress and the purpose is apparent from the face of the Act, *see* § 102(d).

Second, Mr. Nixon states that the representative of President Ford who negotiated the Nixon-Sampson agreement evidently felt that it satisfied the Executive's needs. Plaintiff's Reply Brief at 7. We do not believe that approval by a brand new Chief Executive of an agreement negotiated in some haste and, as plaintiff himself notes, *see* p. 98 *infra*, in a time of some turbulence, necessarily represents the considered judgment of the executive branch, especially since such a contention is to some extent inconsistent with President Ford's having signed the Act. In any event, we are certain that Congress is not bound to accept as conclusive whatever view of the needs of executive continuity a document such as the Nixon-Sampson agreement might be thought to imply.

Plaintiff also asserts at p. 9 of the Reply Brief that no refusal by Mr. Nixon to permit access to documents for national security purposes has been presented. The short answer to this argument is that Congress need not wait until executive needs have not been fulfilled in order to legislate on important matters of public administration; surely "preventive medicine" is a legitimate legislative technique. Mr. Nixon also asserts that the Act is overbroad with respect to this purpose. However, in light of the manner in which all of the documents are mingled, *see* pp. 62-63 *infra*, comprehensive

Although these two interests strike us as the most significant, there are three other interests of considerable force that are served by this Act. First, the events of the past years, and the widespread allegations surrounding them, might properly be thought by Congress to have undermined the nation's faith in its political processes and its confidence in its future. *See* 120 CONG. REC. S 18258 (daily ed. Oct. 3, 1974) (remarks of Sen. Cranston); *id.* at S 18260 (remarks of Sen. Ribicoff). To the extent that short-term public access is consistent with preservation of constitutional rights and privileges, a full airing of these events by disclosure of materials whose contents are peculiarly informative is surely a legitimate congressional pursuit. *See* S. REP. NO. 93-1181, 93d Cong., 2d Sess., at 3, 4, 6 (1974); H.R. REP. NO. 93-1507, 93d Cong., 2d Sess., at 2, 8; 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18233, 18235 (daily ed. Oct. 3, 1974); *id.* at H 11207 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas); *id.* at H 11211 (remarks of Rep. McKinney). *See also* section 104(a) of the Act. And here too, disclosure serves values at the core of the First Amendment. *See* pp. 50-52 and note 39 *supra*.[44]

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review would be necessary to ensure that all materials relating to this purpose could be segregated. Although the factors listed under section 104(a) of the Act do suggest that the regulations promulgated thereunder may be directed to other purposes as well, we believe those purposes to be entirely valid. And legislation is not overbroad when there is no narrower way to serve all of the various purposes to which it is directed. *Cf.* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). With respect to the entire range of purposes involved—especially the interest in preserving a complete and accurate historical record—the Act on its face is not overbroad. *See* pp. 62-63 *infra*.

[44] Although Mr. Nixon appears at one point to concede the legitimacy of this interest, *see* Reply Brief at 16-17, elsewhere he suggests it is illegitimate, *see id.* at 69-70 and n.42. For reasons outlined in note 16 *supra*, we believe that the latter position must be rejected.

The documents and tape recordings are important to the legislative branch because they enable Congress to understand how our political processes have operated, a necessary predicate to informed consideration of the appropriateness of legislative reform and changes in institutional design. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess., at 3, 4 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess., at 2, 3, 8 (1974); 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18235 (daily ed. Oct. 3, 1974). The congressional power to investigate, although limited to areas in which Congress possesses legislative authority, *Eastland v. United States Servicemen's Fund*, *supra*, at 504 n.15, is both broad and integral to the legislative process, *id.* at 504-05 and cases cited. Information from both recent and more distant years may be essential to guide legislative decisionmaking,[45] and therefore, by preserving the Nixon presidential materials, the Act serves to aid the legislative process.[46]

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[45] The record provides examples of such requests made by members of Congress or congressional committees to presidential libraries to use materials, requests that have often been honored. *See* Affidavit of Harry J. Middleton at 4; Affidavit of William R. Emerson, July 22, 1975, exhs. S, U; Affidavit of Daniel J. Reed at 3; Affidavit of John Stewart at 2. A number of requests have already been made by Congress to obtain from Mr. Nixon materials claimed to be relevant to matters of congressional concern. *See* Affidavit of Raymond G. Larroca at 4-5.

[46] Plaintiff at 182-85 of his brief suggests that both this interest and that in informing the public cannot be considered to be especially important in light of the court of appeals' decision in Senate Select Comm. v. Nixon, *supra*. That decision held that the need asserted by the Select Committee was insufficiently compelling to outweigh the need to preserve ex-

Finally, these materials are important to the Judiciary in the event that they might shed light upon material issues in civil or criminal litigation. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess., at 1, 4, 6 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess., at 2, 3, 8 (1974); 120

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ecutive confidentiality. Although there is some language in the opinion that might be thought to support plaintiff's contention, *see* 498 F.2d at 732, we believe plaintiff's reading is overly broad and therefore misleading. The court repeatedly emphasized that its holding was peculiarly dependent upon the special circumstances of that case. *See id.* at 731 ("[p]articularly in light of events that have occurred since this litigation was begun"); *id.* at 732 ("In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power. . . ."); *id.* at 733 (emphasizing "the peculiar circumstances of this case"). The committee's argument that it had a vital need for the material sought was undercut by three important factors: first, the fact that much of the material had, during the pendency of the suit, been voluntarily released by Mr. Nixon, *see id.* at 732-33; second, the fact that the House Judiciary Committee, whose functions substantially overlapped with the Select Committee, had in its possession copies of each of the tapes subpoenaed by the Select Committee, making the need merely cumulative, *see id.*; and third, the fact that disclosure was opposed by the Special Prosecutor because it might prejudice pending criminal prosecutions, *see* Senate Select Comm. v. Nixon, 370 F. Supp. 521, 522-23 (D.D.C. 1974). Moreover, the attempt to obtain materials in that case was at the behest of a single committee of one House of Congress rather than under an Act approved by both Houses and signed and supported by the President. *See* Freund, *supra* note 27, at 38; Sofaer, *supra*, at 292 (by implication); *cf.* O'Brien v. Brown, 409 U.S. 1, 5 (1972) (per curiam). Additionally, the *Senate Select Committee* court did not consider the possibility of permanent destruction or unavailability of the historical record in reaching its decision. Finally, we note that the infringement of executive confidentiality caused by screening materials under this Act is, for reasons already discussed, much more limited than release of materials to a congressional committee whose design was in part to inform the public.

CONG. REC. S 16870-71 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18233 (daily ed. Oct. 3, 1974); *id.* at H 11207 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas). *See also* sections 102(b), 104(a)(2) of the Act. Plaintiff has reminded us that, under the Nixon-Sampson agreement, all materials would be available to judicial process for a period of three years, and the tape recordings for five. *See* Reply Brief at 2-4; pp. 10-12 *supra*. And we note in addition that the Special Prosecutor has indicated that he has fulfilled his need for the materials in the investigations he has undertaken. *See* pp. 16-18 & note 11 *supra*. These facts do not, however, dispose of the genuine need of the Judiciary. In the first place, the agreement was only one between Mr. Nixon and the executive branch, and Congress might have been concerned that it was not immune from amendment. More important, there was no assurance that the need for evidentiary material in litigation would no longer exist after the three-year period. New needs in existing cases might arise; new actions might be brought; in the case of criminal prosecutions, retrials might take place if convictions were reversed upon appeal. The enormous volume of litigation related to Watergate or involving Mr. Nixon, civil and criminal, that has taken place or is now pending, *see* WSPF *Report* at 155-68; Affidavit of Raymond G. Larroca at 6-8,[47] indicates the importance of this interest and belies any notion that three years is a magic period after which the needs of litigants for materials covered by the Act will suddenly disappear.[48]

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[47] The record also indicates that on at least two occasions, the Truman administration obtained materials from the Roosevelt Library for use in civil litigation that arose seven to eight years after the materials were prepared. Affidavit of William R. Emerson, July 22, 1975, exhs. E, K.

[48] Mr. Nixon asserts in his Reply Brief at 5-7 that this congressional purpose is nothing more than an attempt to strip him of the privileges and defenses he might assert were legal

Plaintiff alleges that the Act is overbroad with respect to various of these purposes. We do not believe this to be the case. The Act authorizes retention by the government of only those materials that in some manner have historical significance. *See* sections 101(b)(1), 104(a)(7); note 6 *supra*. It may be true that some of the materials to be retained may never be needed by any historian, member of the public, or branch of government. However, adequate foresight does not exist to permit anyone today to determine what materials may acquire importance, in relation to the congressional objectives, over time. Virtually any item might be needed by a historian, depending upon what subjects seem fit to study some years from now. To a lesser degree, the same point can be made as respects any of the other purposes. Especially insofar as Congress may have wished to establish a practice conducive to widespread use of these materials for all purposes, the retentions cannot be thought to be overbroad.

Nor does it strike us that Congress failed to employ the most narrow means available to screen materials effectively. It is true that archivists will, in the course of reviewing materials, be required to review both (1) materials outside the coverage of the Act and which are plainly plaintiff's private property—for example, various pre-presidential materials of Mr. Nixon's, *see* Nixon Affi-

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process directed to materials in his control. Although we do not need to reach any questions of use of materials after processing has taken place, we do note that Mr. Nixon's suggestion flies directly in the face of section 102(b) of the Act, expressly reserving his rights, defenses and privileges as against legal process, as well as the more general considerations outlined in Part II *supra*. Moreover, at least as respects the privilege protecting executive confidentiality, it is clear that such objections to process, even if constitutionally-based, may be overridden where the need is sufficiently great. *See* United States v. Nixon, 418 U.S. at 703-14; note 50 *infra*.

davit at 2, and (2) materials which, regardless of the state of title, may contain confidential or private communications about a wide range of matters. But those intrusions are inevitable given the manner in which the materials are intermingled. *See* Affidavit of Thomas R. Wolf at 3. In the White House Central Files, *see* note 1 *supra*, no attempt was made to segregate personal, political, or official documents. Affidavit of William J. Hopkins at 8. Moreover, materials from staff employees in the White House were gathered in great haste following Mr. Nixon's resignation, and little is known about the contents of many of the boxes in which they are stored. Deposition of Jack Nesbitt at 42-46; Affidavit of William F. Matthews at 6. Even individual documents may contain both communications that are related to governmental duties, are of great historical interest, and are neither private nor confidential, and communications that are extremely private and confidential and of no historical significance. Affidavit of William J. Hopkins at 8. Thus, as a rule, it is necessary to review each document to some extent in order to classify it. Affidavit of Richard A. Jacobs at 8. As for the tape recordings, they shift suddenly and unpredictably among various subjects of conversation, so that again the comprehensive review necessary to identify conversations related to legislative objectives necessarily will intrude on conversations that may be private, confidential, or wholly unrelated to those objectives. Affidavit of Raymond G. Larroca at 1-4. Because the intermingled state of the materials allows no effective manner of identifying and classifying the materials other than the scheme broadly contemplated under this Act, we find that the Act is not overbroad.[49] We con-

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[49] Regardless of where title in the materials is thought to lie, Congress plainly has authority to pursue these purposes. Insofar as the materials are Mr. Nixon's personal property, they are subject to condemnation under the eminent domain power, and Congress has provided in § 105(c) compensation

clude, therefore, that the great importance of congressional purposes here far outweighs the need to prevent

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for any taking of private property that may be effected. Although such condemnation must qualify as a public use, the scope of legislative power is very broad:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman v. Parker, 348 U.S. 26, 32 (1954); *accord,* United States, *ex rel.* TVA v. Welch, 327 U.S. 546, 551-52 (1946). In United States v. Gettysburg Elec. Ry., 160 U.S. 668, 682-83 (1896), the Supreme Court, in upholding condemnation of land for the purpose of studying the historic Gettysburg battle, indicated that the power to condemn for historical purposes is not to be narrowly construed:

> Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. . . .
>
> No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain.

Accord, Roe v. Kansas, 278 U.S. 191, 193 (1929) ("there is no basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public"); Barnidge v. United States, 101 F.2d 295, 298-99 (8th Cir. 1939) ("Primarily, the right to determine the purpose to be a public one is in Congress"; "We have no doubt of the power of the United States, under the Constitution, to acquire by eminent domain, or otherwise, sites of national historic significance. . . ."); (United States v. Certain Parcels of Land in City of Philadelphia, Pa., 99 F. Supp. 714, 717 (E.D. Pa. 1951), *aff'd,* 215 F.2d 140 (3d Cir. 1954). The discussion

the very limited intrusion on whatever interest—if any—in presidential confidentiality Mr. Nixon may assert, and

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in text of the various historical purposes served by this Act should make it crystal clear that Congress was well within the scope of its power to condemn for historical purposes any property thought to be Mr. Nixon's.

Plaintiff alleges that the power of eminent domain cannot be employed to condemn personal papers rather than real property. However, he provides neither authority for such a contention nor any reason why a distinction between papers and real property should be of constitutional dimension. And it is clearly established that the power of eminent domain extends both to intangibles, *see* Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 400 (1912), and to the product of intellectual activity, *see* Interdent Corp. v. United States, 488 F.2d 1011 (Ct. Cl. 1973) (per curiam). To be sure, prior cases may not have involved condemnation of property implicating privacy interests, but the eminent domain power does not fail whenever privacy concerns arise. Instead, that power remains, subject—like all other sources of congressional power—to the limitation that it must be exercised in a manner consistent with the Bill of Rights. *See* Berman v. Parker, *supra.* The thrust of plaintiff's challenge to any use of eminent domain power seems to consist of allegations that the exercise of that power in this case has violated plaintiff's personal rights, rather than that the purposes whose promotion Congress sought lie outside the legislature's constitutional authority. The parts of this opinion that follow consider whether the Act infringes plaintiff's individual rights.

Insofar as the materials at issue are thought to be the property of the Government rather than that of plaintiff, the source of congressional authority would be Art. IV, sec. 3, which provides in relevant part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

Legislation such as the Freedom of Information Act, 5 U.S.C. § 552 (1970), *see* note 16 *supra,* and the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.* (1970), whose constitutionally seems

hence find his separation of powers and presidential privilege points to be without merit.[50]

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unquestioned, is premised upon this grant of power. Cases construing this section of Article IV have adopted a broad interpretation of Congress' power thereunder. *See* Alabama v. Texas, 347 U.S. 272, 277 (1954) ("The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of Nation."); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 538 (1840) (the question of how to dispose of government property "must be left to the discretion of congress"). Plaintiff makes no attempt to challenge this well-established power, and we believe the Act falls well within this congressional authority insofar as it might regulate public property.

[50] Mr. Nixon argues in his Reply Brief at 44-48 that the presumptive privilege recognized in United States v. Nixon requires persons seeking to overcome a claim of privilege to make a strong showing of need—stronger than mere relevance—to rebut the presumption before even *in camera* screening, or in this case archival processing, can take place. There is support for this view in the language of that decision, *see* 418 U.S. at 713, *quoting* United States v. Burr, 25 F. Cas. 30, 192 (No. 14,692d) (C.C.D. Va. 1807) (Special Prosecutor is required to demonstrate that material under subpoena was "'essential to the justice of the [pending criminal] case,'"); *id.* at 713-14 (suggesting a need for a sufficient showing to rebut the presumptive privilege), in other decisions, *see* Senate Select Comm. v. Nixon, *supra*, 498 F.2d at 729-30; Nixon v. Sirica, *supra*, 487 F.2d at 705-06, 717, and in the opinions of commentators, *see* Freund, *supra* note 27 at 31; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 61 (1974). On the other hand, a similarly strong argument, based on the same kinds of sources, can be made for the proposition that mere relevance is all that is required to rebut the presumptive privilege. *See* United States v. Nixon, *supra*, at 709 ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system . . . depend[s] on full disclosure of all the facts, within the framework of the rules of evidence."); *id.* at 714 ("Statements that meet the test of

IV. CLAIMS RELATING TO PRIVACY

The most troublesome challenge that plaintiff raises is that the Act violates his constitutionally based right of privacy. Although his brief bifurcates this claim, presenting both a right of privacy and a search and seizure claim, we do not believe that the two are genuinely distinct. The argument setting forth the right to privacy claim relies heavily upon search and seizure precedents, not surprisingly as, in our view, the Fourth Amendment provides by far the clearest and best-established source

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admissibility and relevance must be isolated; all other material must be excised."); *id.* at 712-13:

> . . . The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. . . . The President's broad interest in confidentiality will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

See also Sun Oil Co. v. United States, *supra*, 514 F.2d at 1024-25; Smith v. Schlesinger, 513 F.2d 462, 477 & n.52 (D.C. Cir. 1975); Cox, *supra*, at 1414; Ratner, *supra*, at 96-98.

We need not, we believe, indicate our agreement with one or the other of these interpretations. For, in our view, either a former President may not validly claim executive privilege at all, or if he may do so, his claim is entitled to much less weight than that accorded a claim asserted by an incumbent President. It follows that a claim of privilege by a former President may be overcome by a showing less strong than that needed when the incumbent raises the claim. Since we believe the materials are manifestly relevant to important government interests asserted here, and since here—as was not true in United States v. Nixon—confidential examination of materials will not necessarily have as its purpose identification of materials to be turned over immediately to other government officials and perhaps to be used at public criminal trials, we do not believe that recognition of a presumptive privilege prevents screening by government archivists.

of constitutional protection of privacy.[51] Moreover, the key in adjudicating a search and seizure claim is whether an individual can demonstrate an invasion of his "reasonable expectation of privacy." *E.g., Katz v. United States*, 389 U.S. 347, 351-53 (1967); *id.* at 360-61 (Harlan, J., concurring). The extent to which there is such an invasion, and the justification for it, must be the focus in adjudicating both claims, and they may be discussed jointly.

We reiterate at the outset that we concern ourselves only with the constitutional questions raised with respect to the process by which the screening will be performed. Since any claim by plaintiff that his privacy will be invaded by public access to private materials must be considered premature when it must actually be directed to

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[51] Insofar as Mr. Nixon's privacy claim rests upon the privacy in political association protected by the First Amendment, it is discussed separately in the next part of this opinion. Insofar as Mr. Nixon suggests that he has a general right of privacy different from and broader than the protection of the Fourth Amendment, we must reject that argument. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court discussed the various sources of constitutional protection of privacy. It noted that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion" and that other provisions of the Constitution, such as the First Amendment, also provide specific protection against particular government actions in some way involving personal privacy. But the Court noted that a "general right to privacy" finds support not in the Constitution but only, if at all, in the law of particular states. *Id.* at 350-51 & n.5. The only decision plaintiff cites to suggest otherwise is Stanley v. Georgia, 394 U.S. 557 (1969). Although there is some broad language in *Stanley* that could be read to suggest a general right of privacy, *see id.* at 564, the decision in that case rested on the special conjunction of privacy and free speech challenges to a conviction for the possession in a private home of obscene matter, and emphasized the traditional First Amendment aspects of the case, *see id.* at 559-64, 565-67.

the regulations once they become effective, we need not consider how the materials will be treated after they are reviewed. *See* pp. 18-28 *supra*.[52]

It is difficult to know precisely how many of the 42 million pages of documents and what proportion of the 880 tape recordings implicate plaintiff's privacy, but the ratio appears to be quite small in both cases. As far as the documents go, if plaintiff himself saw no more than 200,000, *see* p. 40 *supra*, we find it difficult to believe that more than a tiny fraction of them contain materials which Mr. Nixon reasonably expected to be private. Included within the materials falling under the Act, for example, would be internal memoranda from an executive agency which, after review by numerous individuals in that agency, were transmitted to a member of the White House staff but never to Mr. Nixon, *see* note 1 *supra;* the attenuated connection of such material to Mr. Nixon and the exposure to many others makes any privacy claim in such materials on his part impossible to sustain. Wherever bare legal title may be thought to

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[52] The Proposed Regulations, *supra* note 13, would provide not insignificant protection of personal privacy. First, any individual would have the opportunity to assert any legal or constitutional right or privilege which would prevent or limit public access, and have an administrative determination, with ultimate access to judicial review, as to the validity of the claim. § 105-63.401-1(a), (c). Second, with respect to materials of historical significance unrelated to abuses of governmental power, access will be restricted to materials whose release would "constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person. . . ." § 105-63.402-2(b)(2). With respect to materials that are related to abuses of government power, access restrictions will be imposed in the same circumstances as above, subject, however, to the proviso that no restrictions shall be imposed on access to personal information "essential to an understanding of the abuse of governmental power." § 105-63.402-1(b).

reside in respect of the papers here in issue, it seems clear that the great bulk of them—those relating to the conduct by Mr. Nixon of his duties as President and a political leader of the nation—are quite unlike private property in light of the great public interest attaching to them. It is of course black letter law that the Fourth Amendment protects privacy and not property, *e.g.*, *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974) (plurality opinion); *Warden v. Hayden*, 387 U.S. 294, 304 (1967), but in this case the two may not be wholly distinct concepts. Rather, the public trust in the bulk of these papers [53]—

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[53] When we speak of a public trust, we mean the consistent recognition that such materials are infused with a public interest for all of the reasons outlined above, *see* pp. 48-61 *supra*, and that if the President is to exercise control over their disposition, he does so as a "public trustee," *cf.* Freund, *supra* note 27, at 21.

> Franklin Roosevelt . . . inaugurated the idea of depositing the White House files in a special library set up under the National Archives for that purpose. This new practice . . . clearly implied an obligation [on the part of the President to give his papers to the nation] and an overriding public interest in the preservation and orderly opening of the White House files.

Schlesinger, *supra* note 14, at 178. President Eisenhower's son John, who had substantial responsibility for the disposition of his father's papers, expressed much the same sentiment, indicating that his father "felt that the presidential papers ultimately belong to the public . . . ." *Hearings on H.R. 16902 before the Subcomm. on Printing of the House Comm. on House Administration*, 93d Cong. 2d Sess., at 77 (1974). President Johnson shared that view:

> It has long been my belief that the papers and other historical materials of a President constitute a vital part of our Nation's historical heritage and that such papers and materials should be permanently preserved and made available for scholarly research and study.

Affidavit of Richard A. Jacobs, exh. I. *See also* p. 50 *supra* (statement of Harry S. Truman); Letter of January 19, 1953

be it denominated as a property interest or otherwise—itself undercuts the reasonableness and force of any privacy expectation that Mr. Nixon would assert in the bulk of the papers. As for the tape recordings, we have no estimate by Mr. Nixon of what percentage of the conversations implicate Mr. Nixon's privacy rights. But recordings made in the offices provided for use by the President must surely relate primarily to the conduct of the presidency. Moreover, insofar as Mr. Nixon has made public certain portions of the tape recordings, *see* p. 41 *supra* he can no longer claim a privacy right in them. *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *United States v. Katz*, *supra*, at 351.

Among all of the papers and tape recordings falling within the Act, however, are some papers and materials containing extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files. Nixon Affidavit at 8-12. Segregating those that are private from those that are not private requires rather comprehensive screening, and archivists entrusted with that duty will be required to read or listen to private communications. *See* pp. 62-63 *supra*. Although the fact that private materials comprise only a small fraction of the total may be relevant to the Act's overall reasonableness, it in no way indicates that those private materials do not fully implicate privacy concerns.

This screening process would raise little, if any, constitutional difficulty were the Act wholly prospective in operation. A President who knew he would be subject to such a statute would have the opportunity to file

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from Jess Larson, Administrator of GSA, to Harry S. Truman, *reprinted* as exh. C to Affidavit of Richard A. Jacobs ("I have long been aware that you consider the possession of these papers a public trust . . . .").

materials to prevent commingling, to prevent retention of some materials, or to take other steps to protect his privacy. If commingling of private and nonprivate materials persisted, it would be difficult to claim that an objection, based on privacy grounds, to archival processing necessary to segregate materials would be reasonable. In this case, however, Congress acted retroactively with respect to Mr. Nixon. Moreover, it acted against a historical background of *de facto* presidential control over the disposition of materials. In the era when presidential libraries have been established by former Presidents, it has been the consistent practice for those Presidents to remove from the White House virtually all the files: the Central Files and all of its component parts except for the relatively insignificant precedent file, *see* note 1 *supra*; any files maintained by the President or his secretary; the non-institutional files of the National Security Council, *see* note 1 *supra*; Affidavit of Jeanne W. Davis at 3; and materials from the files of staff members except those relating to personal activities, Affidavit of William F. Hopkins at 6; Affidavit of John S. D. Eisenhower at 5; Deposition of Jack Nesbitt at 69-70. The only files left behind are the precedent file of the Central Files; the card file of the Records Office, *see* note 1 *supra*; and the files of the Administrative Office, *see id.* It was the common assumption of those familiar with this practice that each President would follow it. McDonough, *supra* note 34, at 2-4; Hoxie, *Who Owns Presidential Papers?*, 27 MANUSCRIPTS 6, 10 (1975).

Although every President who has established a presidential library has requested and obtained the assignment of archivists to screen materials, Affidavit of Richard A. Jacobs at 8-9, some of which undoubtedly were private in nature, *see* sources cited note 33 *supra*, these Presidents or their designees have removed some items from the screening process, either by excluding them

from the scope of the deposited materials or by placing them on deposit but forbidding their even being screened. On the whole, such exclusions have involved materials private in nature, often relating to personal and financial aspects of family relations.[54] Moreover, if other pri-

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[54] The record does not clearly indicate whether President Hoover actually excluded any materials from the scope of his gift, although his offer to deposit materials in a presidential library reserved the right to exclude from the deposit personal and private materials. Affidavit of Richard A. Jacobs, exh. A. President Roosevelt indicated his intention to go through his papers and select those that were to be retained by his family. Because of his death, this function was to be performed instead by designated individuals. *See* Affidavit of William R. Emerson, July 22, 1975, exh. A. Roosevelt's personal secretary "worked with" his personal file for several months before it was turned over to the library, Affidavit of William J. Hopkins at 9, and the record is uncertain as to how many documents she may have removed. A number of personal documents that were deemed to be personal family correspondence were turned over to the Roosevelt family by the Library in 1948, later returned to the Library in 1954-55, and have been on loan to the family since then; it is unclear to what extent this correspondence was reviewed by library personnel. Letter of July 23, 1975 from William R. Emerson, Director of the Roosevelt Library, to R. Stan Mortenson, at 3.

President Truman withheld from deposit the personal file maintained in the White House by his personal secretary; upon his death in 1974, this file was turned over to the library, although the terms of the will excluded a small number of items determined by the executors of his will to pertain to the business or personal affairs of the Truman family. Letter of July 23, 1975 from Benedict K. Zobrist, Director of the Truman Library, to R. Stan Mortenson, at 1, 2-3; *Whistle Stop: The Harry S. Truman Library Institute Newsletter*, Vol. 3, No. 2, Spring, 1975, at 3. President Eisenhower's offer to deposit his presidential materials excluded those materials determined by him or his representative to be personal or private, Affidavit of Richard A. Jacobs, exh. F, and President Eisenhower reviewed materials in files whose possession he retained after leaving office, Affidavit of John

vate materials were not excluded from review in the past, that might demonstrate little more than that past Presidents chose not to protect fully their privacy rights, a choice not necessarily binding upon Mr. Nixon. Regardless of the state of title to the materials in question—an issue we do not reach [55]—we believe that the manner in which such materials have been treated by past Presidents, together with the legislative approval of such treatment, *see* V. Treacy, *Ownership of Presidential Papers*, Sept. 24, 1974 (Library of Cong., Cong. Rsch. Serv.); 43 OP. ATT'Y GEN. No. 1, at 3-5 (Sept. 6, 1974), gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his

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S. D. Eisenhower at 6. The presidential materials of John F. Kennedy deposited with GSA did not include certain objects and documents relating to his private affairs. Letter of July 23, 1975 from Dan H. Fenn, Jr., Director of the Kennedy Library, to R. Stan Mortenson, at 3. There are also 68 dictabelts of telephone conversations, and 125 magnetic tapes of meetings involving President Kennedy, which are or have been physically stored in the Kennedy Library but have not yet been turned over to the library or reviewed by archivists. Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson at 5. President Johnson's offer of deposit excluded items which he determined to be of special or private interest to personal or family affairs. Affidavit of Richard A. Jacobs, exh. I.

[55] We need not reach this issue because we believe that plaintiff's reasonable expectation of privacy is adequately established by the practice of *de facto* control of presidential materials by former Presidents. That expectation does not depend upon whatever implications, if any, that practice has for the question of ownership, nor would plaintiff's Fourth (or First) Amendment claim be stronger were we to hold that the materials at issue were his property.

We have already indicated that the ownership of the papers does not affect the existence of congressional authority to regulate their disposition. *See* note 49 *supra*.

consent. *See* 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); Nixon Affidavit at 17, 19. Whether this intrusion on privacy interests is called just that or is considered a search and seizure, it constitutes the central issue in adjudicating plaintiff's privacy claim.

We do not believe the Fourth Amendment's warrant requirement is applicable to this case,[56] and hence the

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[56] None of the parties has given much consideration to this aspect of plaintiff's search and seizure claim, an inattention that we believe reflects the inapplicability of that requirement to this case. We have difficulty fitting this case within the normal rule that, absent a recognized exception, a warrant must be obtained regardless of the reasonableness of the search. That difficulty may be due in part to the consideration and approval by Congress of the very search contemplated under the Act. It may also be attributable to the judicial safeguards available to Mr. Nixon prior to the infringement of protected interests. The materials in question were in government custody pursuant to the Nixon-Sampson agreement before this Act was passed. Although that custody has not adhered to the agreement's terms, the deviations are attributable to court orders issued in the consolidated cases, before this suit was brought or the Act was passed. *See* note 10 *supra*. Plaintiff in this proceeding has the opportunity to challenge the Act's facial validity before he has been harmed in any way by the Act's operation. *See* also note 23 *supra*. In these special circumstances, we have trouble finding the warrant requirement to be applicable.

Even assuming its applicability, we have no difficulty upholding the legality of a "warrantless search" in this case. In a series of cases involving so-called administrative searches, the Supreme Court has not uniformly required warrants to be obtained. *See* United States v. Biswell, 406 U.S. 311, 316-17 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). Indeed, in the only case involving a statutory scheme in which searches did not help to enforce criminal laws—a characteristic that the regulations may emulate, *but see* note 61 *infra* or, if necessary, be required by judicial review to emulate—the Supreme Court held that a warrant was

only touchstone of the legality of a search and seizure is its reasonableness. *See, e.g., United States v. United*

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unnecessary. Wyman v. James, 400 U.S. 309 (1971). The *Wyman* court distinguished earlier decisions requiring warrants for housing inspection searches, *see* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967), on the ground that in those cases criminal sanctions were available—either if an individual refused to consent to a search or if a search revealed housing code violations that were not properly remedied. 400 U.S. at 324-25; *see* Camara v. Municipal Court, *supra*, at 530-31, 533.

A distinction between civil and criminal searches finds support not only in decided cases but also in the Fourth Amendment's language and values. The amendment contains two clauses, one prohibiting unreasonable searches and seizures and one requiring that warrants be issued only upon probable cause. Reconciliation of the two clauses has proved to be a central problem in the development of Fourth Amendment law. *E.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring); *id.* at 510-12 (White, J., dissenting); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-44 (1969); White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 172-73, and sources cited. The distinction outlined above would achieve reconciliation by suggesting, as a guide rather than a rule, that a particularized showing of probable cause must ordinarily be made in cases involving criminal investigation (the warrant clause), but a more generalized showing of reasonableness, without a warrant, may suffice for noncriminal cases (the reasonableness clause). *Id.* at 178-80.

The distinction would also find support in the function that a magistrate can serve. In a criminal case, the magistrate can evaluate the particular facts to determine the probability that an offense has been commited and evidence thereof may be found at a specified location—a determination limited in scope and not in any way alien to the judicial function. *See* LaFave, *Administrative Searches and the Fourth Amendment*, 1967 SUP. CT. REV. 1, 23-24. Where searches further broad legislative policies by their cumulative contribution to those ends, each being of little value but many being necessary to promote such ends, the competence of magistrates in reviewing

States District Court, 407 U.S. 297, 309 (1972); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal*

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such judgments is surely open to question. *Cf., e.g.*, Cox, *supra*, at 1429; Freund, *supra* note 27, at 38; Sofaer, *supra*, at 292-94. Here the various purposes subsumed under the rubric of preservation of the historical record of the Nixon presidency can be served only by a comprehensive review process designed to preserve the whole record; isolated bits and pieces are of little value except as parts of a larger picture. Determining the review process necessary to further these ends is a judgment legislative in nature, and one of which judicial review is unlikely to be effective.

It is of course true that in *Camara* the Court required a warrant procedure to review such a legislative kind of judgment. But that case is different from this one in several important respects. First, as noted above, there was a genuine possibility that the search would lead to the imposition of criminal sanctions. Second, if the warrant requirement there made any sense, a question open to some doubt, *see* LaFave, *supra*, at 27, it was to "diminish the chance of an inspection 'based on caprice or on personal spite' or as 'a front for the police,'" LaFave, *"Case-by-Case Adjudication" Versus "Standardization Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 153, *quoting* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 271 (1960), *and* Abel v. United States, 362 U.S. 217, 242 (1960). Here, however, where a comprehensive one-time screening process is contemplated, it is difficult to see how even that function could be served. The scope of the intrusion is presently clear in its broadest outline, and will be made clearer by regulation. There is little possibility that government officials will abuse their discretion in the screening as it will be prescribed by the Act, for that discretion, in terms of the scope of the processing, will be quite broad. Nor, for the same reason, would a warrant procedure enforce particularity in the search. Another purpose of the requirement —limiting the possibility of entry by a criminal into private homes under the guise of official authority—is also inapposite. And finally, since regulations promulgated may prohibit use of evidence gained from the screening process, we need not now worry about the possibility of archivists acting as a front for the police. Where searches take place according to prescribed statutory and administrative standards; where those

Court, 387 U.S. 523, 534-39 (1967). There is "no ready test for determining reasonableness other than by bal-

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standards themselves are reasonable; and where a warrant sufficiently flexible to accommodate reasonable intrusions provides protection that is wholly illusory, insistence upon compliance with the warrant requirement in a purely "civil" case would exalt form over substance. *See* United States v. Biswell, *supra*, at 316.

Finally, a distinction between civil and criminal searches finds support in the notion that the Fourth Amendment is directed not simply against invasions of privacy but also against the use in the criminal process of evidence obtained through such abuses. *See* Camara v. Municipal Court, *supra*, at 530-31 (by implication); White, *supra*, at 180. Such a notion is closely related to a value that has long been associated with the exclusionary rule: the preservation of judicial integrity by refusing to sanction illegal police practices by admitting the fruits of such illegality in trial. *See* United States v. Peltier, 95 S. Ct. 2313, 2317-18 (1975); *id.* at 2324-27 (Brennan, J., dissenting); Brown v. Illinois, 95 S. Ct. 2254, 2259 (1975); *id.* at 2264-65 (Powell, J., concurring). Although the importance ascribed to this purpose, as compared with the deterrent purpose, of the exclusionary rule, has varied over time, *see, e.g.*, Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10 (1975); *compare, e.g.*, Calandra v. United States, 414 U.S. 338, 347-48 (1974), *with, e.g., id.* at 355-67 (Brennan, J., dissenting); Elkins v. United States, 364 U.S. 206, 222 (1960); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *id.* at 470 (Holmes, J., dissenting); Weeks v. United States, 232 U.S. 383, 391-92, 394 (1914), there appears to be little doubt that Fourth Amendment values are invaded more substantially when not only is privacy infringed, but the result of that infringement is the use of the fruits of the illegality at a criminal trial.

We by no means suggest that warrants are never required in civil cases, but rather that in some civil cases the nature of the statutory purpose, and the relation of the magistrate's function to that purpose, make such a requirement inappropriate. When important interests are at stake which could not be furthered without permitting broad searches based on leg-

ancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.; accord, e.g., Terry v. Ohio, supra*, at 21. The problem before us is how to interpret the reasonableness requirement when facing materials which (1) for the most part are not private and are related to congressional purposes, (2) include items that are personal and private and/or unrelated to those purposes, and (3) are impossible to segregate other than by reviewing all of them.

We believe that the precedents upholding the legality of electronic surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970), argue forcefully for finding that the Act before us does not unconstitutionally infringe plaintiff's privacy. It is true, of course, that the provisions of Title III govern searches primarily designed to investigate criminal violations, a quite different emphasis from that of this Act; but, as we note below, that difference only strengthens our conclusion that the Act does not violate any privacy rights. Electronic surveillance of wire communications involves interception of conversations (1) some of which are expected to be related to law enforcement, (2) some of which are not, and (3) for which there is no available means to segregate the one from the other except by reviewing them all.[57] Thus, such surveillance, like the

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islative standards rather than a particularized showing, *see* United States v. Biswell, *supra*, at 315-16; when judicial intervention serves no genuine function, *id.* at 316; and when criminal consequences will not flow from the search, then we believe it may be and, in this case, is improper to apply the warrant requirement.

[57] This problem is not unique to electronic surveillance or the screening to be done under this Act; rather, it may exist whenever a search is made for documentary evidence that is intermingled with other material unrelated to the purpose of the search. It is instructive to note that the congressional

processing involved under this Act, necessarily contemplates intrusions into communications that may be both unconnected to legitimate government objectives and intensely private. If that fact alone were thought sufficient to render surveillance unconstitutional, then law enforcement officials would be foreclosed from ever employing that technique. No court has reached such a conclusion. Instead, every one of the ten circuits that have ruled upon the question has upheld the legality of surveillance conducted according the scheme of the Omnibus Act. *Turner v. United States*, No. 73-2740 (9th Cir. July 24, 1975), slip op. at 18-19; *United States v.*

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scheme before us is in some respects very similar to the procedure prescribed by the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Official Draft, Approved May, 1975) for dealing with intermingled documents. Under the Code, documents that "cannot be searched for or identified without examining the contents of other documents" shall be impounded by the seizing officer. § SS 220.5(2). After a judicial hearing, an order is issued to specify the conditions and limitations upon any search of the documents' contents. § SS 220.5(3). The purpose of this order, as relevant to this case, is to prevent an excessive intrusion on privacy by providing such safeguards as permitting a party to show that certain portions of the seized materials could not contain the items sought, *see* p. 29 & note 22 *supra*, to have counsel present, and to request that a special master rather than police do the searching. § SS 220.5, Note.

Thus under the Code, materials initially are merely seized and taken into custody, as they have been under the Act. More detailed processing awaits consideration in a hearing possibly leading to the imposition of particular limitations, as under the Act processing awaits particularized consideration under the regulations with judicial review available before any further search begins. Processing may be done not by law enforcement officials but by judicially-appointed individuals, just as under the Act screening will be done by skilled, discreet, and professional archival personnel. These similarities reinforce our view that the processing scheme contemplated by the Act is an appropriate and legal one.

Sklaroff, 506 F.2d 837, 840 (5th Cir.) *cert. denied*, 96 S. Ct. 142 (1975); *United States v. Ramsey*, 503 F.2d 524, 526-31 (7th Cir. 1974), *cert. denied*, 420 U.S. 933 (1975); *United States v. Martinez*, 498 F.2d 464, 467-68 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v. James*, 494 F.2d 1007, 1012-13 (D.C. Cir. 1974); *United States v. Tortorello*, 480 F.2d 764, 771-75 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States v. Bobo*, 477 F.2d 974, 978-82 (4th Cir. 1973), *cert. denied sub. nom. Gray v. United States*, 421 U.S. 909 (1975); *United States v. Cafero*, 473 F.2d 489, 493-501 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *United States* v. *Cox*, 462 F.2d 1293, 1302-04 (8th Cir. 1972); *United States v. Cox*, 449 F.2d 679, 683-87 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

Of course, that scheme requires that a variety of standards and procedures be met before surveillance may be employed. Although the parallel is not, of course, perfect, we believe that this Act does not on its face deviate from those standards and procedures in their principal aspects. For example, under the Omnibus Act, surveillance can be conducted to investigate only designated crimes that are serious in nature, 18 U.S.C. § 2516 (1970), and only when normal investigative procedures have failed or would be likely to do so, *id.* § 2518(3)(c). Here, we have a processing scheme without which national interests of overriding importance cannot be served, *see* pp. 48-63 *supra*, and hence, in terms of the seriousness of the need and the inability to employ potentially less restrictive means, the Act conforms to the spirit of the Omnibus Act. The Omnibus Act also requires that the interception of the communication be minimized. 18 U.S.C. § 2518(5); *see, e.g., United States v. Scott*, 516 F.2d 751 (D.C. Cir. 1975); *United States v. James*, *supra*. Although the Act before us does not so require in its statutory provisions, as we indicated above,

see p. 29 *supra*, the scheme under which the materials will be processed could properly follow such a practice, as well as other practices designed to protect Mr. Nixon's privacy to the maximum extent possible. Thus, we believe the question of the Act's facial validity falls within the precedents upholding the constitutionality of Title III.[58]

Furthermore, there are other factors that suggest that any invasion of legitimate expectations of privacy is entirely reasonable. Whether regarded as making the legality of this Act even clearer than the legality of electronic surveillance or as providing an independent line of argument that the Act is valid, we believe these factors indicate that Mr. Nixon's privacy claim cannot be sustained. First, the percentage of documents and conversations in which plaintiff has no reasonable privacy expectation, although it cannot be estimated with precision, appears to be extremely high. A comparison to the Omnibus Act is instructive. If we assume that all 200,000 of the documents Mr. Nixon saw, and no others, implicate his privacy interests (assumptions that may both be somewhat inaccurate, but whose inaccuracies are offsetting, and which on balance do not seem ungenerous to Mr. Nixon's claim), a very large fraction of the 42,000,000 pages of documents would appear to be nonprivate, and it appears that a very high percentage of them would be related to government interests served by the Act. The ratio of conversations on the 880 tape recordings, although less certain and perhaps lower, is most likely also quite high.

[58] It is true that Title III, unlike the Act, also requires adherence to a warrant requirement detailed with some specificity in 18 U.S.C. § 2518 (1970). We believe, however, that the Fourth Amendment's warrant requirement is inapplicable to the situation before us, in part because it would serve little purpose, *see* note 56 *supra*, and hence this distinction between the two statutory schemes is unimportant for our purposes.

By contrast, the most recent report on surveillance conducted pursuant to the Omnibus Act indicates that for the calendar year 1974, the overall average percentage of incriminating intercepts to total intercepts per authorizing order was just over 50%. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS, January 1, 1974 to December 31, 1974, at X (Table 4). Particular wiretaps resulted in interceptions none, or only a very small percentage, of which were related to government law enforcement objectives. *Id.* at 2-11 (Table A-1), 23-70 (Table B-1). Even if we were to assume that some of the interceptions included in these figures were illegal and hence, the figures should be somewhat higher, nonetheless, the percentage of total intrusions related to statutory objectives appears to be strikingly higher under the Act before us than is true especially of individual instances of electronic surveillance, but also of such surveillance considered on average. The fact that only a small fraction of the vast number of materials here at issue seem likely to implicate Mr. Nixon's privacy suggests the reasonableness of the screening process contemplated by the Act.

Second, the infringement of privacy caused by review by archivists with an unblemished record for discretion, *see* p. 45 *supra*, is less wide-ranging than that resulting from ordinary criminal investigation whose purpose is use of evidence at trials exposed to the public.[59] Indeed,

[59] Plaintiff's brief makes frequent reference to the staff of 100 archivists who will be engaged to process the materials, *see Senate Hearings on GSA Regulations* at 4. The need for so large a staff arises from the enormous quantity of materials at issue. However, the figure of 100 archivists should not be taken to suggest that each document or conversation will be reviewed by all 100. Rather, we suspect that the processing scheme finally adopted—like the one that GSA has

although Mr. Nixon might, had he carried out his stated intention to establish a presidential library, have removed some of the most private materials before deposit, it seems unlikely that he, unlike his predecessors, would have had the time or the inclination to attempt to remove all documents implicating his privacy. *See* pp. 42-46 *supra*. Thus, we suspect that he contemplated permitting archivists to review materials in which he had a reasonable expectation of privacy. That would not, of course, operate to defeat his expectation. However, we do believe it helps to indicate that, in the special situation of documents accumulated by a President during his tenure and reviewed by professional government personnel, pursuant to a process employed by past Presidents, any intrusion into privacy interests is less substantial than it might appear at first.[60] *Cf. United States*

currently proposed—will ordinarily contemplate only one individual's screening any particular item, and when in difficult cases guidance is needed or administrative appeals are taken, there would still be only several, rather than five score, archivists involved. *See generally* Proposed Regulations, *supra* note 13, § 105-63.401-2.

[60] In his Reply Brief at 56, plaintiff insists that there is a

> seemingly obvious difference between review of materials by persons—be they archivists or not—acting under and responsible to the owner of the papers, and review by persons acting under directions of and responsible to a suspicious and hostile Congress and cowed executive officials.

This argument proves little to us except that what may be obvious to one person is not obvious to others. It is difficult to see how archivists, charged with the difficult and delicate task of screening materials with an eye toward historical value, protection of individual rights, and the classificatory needs of a documentary library, have a great deal of leeway in the performance of their duties for loyalty to individuals or institutions. So long as the standards defining the categories into which various materials are placed are proper, we see no reason to find improper the implementation of those stand-

v. Nixon, *supra*, 418 U.S. at 706 (stating, in the context of executive privilege rather than right to privacy, that "we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide"); *Sun Oil Co. v. United States*, *supra*, 514 F.2d at 1024. *See also* note 57 *supra*.

Third, it is possible that the regulations will expressly prohibit use in criminal investigation and prosecution of

ards by archivists whose record is a tribute to their profession, merely because particular personnel were selected by GSA rather than by Mr. Nixon.

Although in his Affidavit at 19, Mr. Nixon asserts that Presidents Truman, Eisenhower, and Johnson assisted in the selection of archivists to review files, the evidence in the record does not clearly establish whether that assertion is accurate. The record is most complete with respect to Lyndon Johnson, who appears to have recommended the individual who was later selected as Director of the Johnson Library but seems not to have played any role in the selection of the archivists actually performing the day-by-day processing. *See* Affidavit of Harry J. Middleton at 2; Letter of Aug. 12, 1975 from David J. Anderson to R. Stan Mortenson, at 2. It also appears that a committee of individuals designated by Herbert Hoover had a voice in the selection of Directors of the Hoover Library, Affidavit of Richard A. Jacobs at 3-4, and that Harry Truman expected to have some voice in selecting two archivists assigned to him immediately after he left office, *id.*, exhs. B, C, although it is unclear to what extent, if any, he ultimately participated in selection.

Mr. Nixon's real objection may be that the standards according to which materials are categorized are established by GSA rather than by him, an allocation of responsibility that we have already found to be justified. *See* pp. 46-48 *supra*. We also note that GSA, whether or not required to do so by regulation, *see* pp. 28-30 *supra*, might give Mr. Nixon some voice in the selection of personnel.

any information derived from archival processing. That possibility is far more than chimerical in light of the Special Prosecutor's having indicated he has obtained all evidence needed for his investigations.[61] *See* note 11 *supra*. In any event, such a prohibition could be imposed through judicial review of regulations were it thought to be constitutionally compelled. *See also* note 18 *supra*. The protections of the Fourth Amendment, of course, apply to searches that are unconnected to enforcement of criminal laws. *See, e.g., Camara v. Municipal Court, supra*, at 530-31. But there is considerable authority for the proposition that a less strict and particularized government showing is necessary to comply with the Fourth Amendment's reasonableness requirement when the search is entirely "civil" in nature. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 278-79 (1973) (Powell, J., concurring); *Wyman v. James*, 400 U.S. 309, 321, 323-24 (1971); *id.* at 344 n.4 (Marshall, J., dissenting) (by implication); *Camara v. Municipal Court, supra*, at 530-31, 533, 537-38; White, *supra* note 56, at 178-80; Testimony of Attorney General Edward H. Levi before the Senate Select Comm. to Study Governmental Operations with respect to Intelligence Activities, Nov. 6, 1975, at 24-25, 32-35, 41-44.[62] *See also* note 56 *supra*.

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[61] We recognize, of course, that the Proposed Regulations, *supra* note 13, require archivists to bring to the attention of the Administrator, for referral to law enforcement officials, materials reflecting an apparent violation of the law. § 105-63.401-2(d). We reiterate, however, that until these regulations have lain before Congress for ninety legislative days, they have no legal force, and during that period are subject to disapproval by either House and perhaps to amendment by GSA itself.

[62] It might be suggested that such authority confuses rights and remedies; searches may unreasonably intrude upon privacy regardless of the use of any evidence obtained. We do not believe such an objection to be well-founded. Though it is beyond doubt that some searches are unreasonable merely

This authority also lends weight to the conclusion that any invasion of privacy interests—that is, any search and seizure—contemplated by the Act is reasonable.[63]

We would be less than candid were we to state that we find it as easy to dispose of Mr. Nixon's privacy claims as his claim of presidential privilege. But on balance, we believe that the congressional act here is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives. The processing contemplated by the Act —at least as narrowed by carefully tailored regulations —represents the least intrusive manner in which to pro-

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because of their initial intrusive effect, the overall impact on an individual's privacy and security depends upon whether the government's motive is hostile or benign, the scope of any subsequent disclosure of private materials, and the harshness of any consequences that might follow. *See* Testimony of Attorney General Edward H. Levi, *supra*, at 43-44; note 56 *supra*.

[63] Mr. Nixon relies heavily upon Stanford v. Texas, 379 U.S. 476 (1965), as support for his privacy claim. *Stanford* involved a search designed to obtain evidence that an individual had violated a "many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses, each punishable by imprisonment for up to 20 years." *Id.* at 477. The search warrant, which the Court assumed to be issued upon probable cause, purported to authorize a search of private premises for books, records, and other materials concerning illegal Communist activities. Several officers spent more than four hours gathering about half the books they found in Stanford's house, and those seized included works of Sartre, Marx, Pope John XXIII, Justice Hugo Black, Theodore Draper, and Earl Browder, as well as private documents including a marriage certificate, insurance policies, household bills and receipts, and personal correspondence. *Id.* at 479-80. The Court held this to be an unconstitutional general search, noting also that special care in protect-

vide an adequate level of promotion of government interests of overriding importance. *See United States v. Biswell*, 406 U.S. 311, 315-16 (1972); *Camara v. Municipal Court, supra*, at 535-36; (1967); LaFave, *Administrative Searches and the Fourth Amendment*, 1967 SUP. CT. REV. 1, 14-17. Although the invasion of Mr. Nixon's privacy from processing, even by discreet and professional government archivists, of all of the materials at issue is not insignificant, we do believe, in light

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ing Fourth Amendment rights is appropriate when the things to be seized are books and the basis for their seizure is their content. *Id.* at 485.

Although the concern for limiting government intrusions where First and Fourth Amendment protections coalesce is an important one, we do not believe *Stanford* to be in any way controlling. First, the seizures in that case were enormously overbroad, encompassing material whose seizure was plainly unrelated to any legitimate government objectives. That is not the case as respects the comprehensive screening process necessary here to further a variety of valid legislative objectives. Second, the law enforcement officials made no attempt, in either procuring or executing the warrant, to minimize the intrusion, a possibility that may occur, either through force of regulation or as a matter of archival practice, under the Act. *See* pp. 81-82 *supra*. Third, the search in *Stanford* intruded upon all of an individual's personal papers maintained in his private home in the hopes of finding a few pieces of incriminating evidence, as compared to screening millions of pages of presidential materials not implicating privacy concerns and related to government objectives and, as an inescapable concomitant of that process, reviewing the small fraction of the materials that is private. Fourth, the very purpose of the search in *Stanford* was to enforce criminal laws, a purpose that is not central and might even be prohibited under this Act. Finally, although the *Stanford* Court was not required to reach the question of the constitutionality of the state statute involved, it may well have been influenced by the belief that government investigation or prosecution of suspected Communists, if not unconstitutional under the First Amendment, was at the very least not an admirable spectacle.

of the special circumstances before us in this case, that it is not unreasonable and hence does not call into question the facial constitutionality of the Act. Hence, we find plaintiff's claim to be without merit."[64]

V. FREEDOM OF SPEECH AND ASSOCIATION

Mr. Nixon asserts that the Act denies him the protection of expressive activity guaranteed by the First Amendment. The argument is cast in a variety of forms. It is alleged that the Act invades the private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by Mr. Nixon—especially those critical of themselves—will refuse to associate with him. The Act is furthermore said to chill Mr. Nixon's expression because he will be "saddled" with prior positions communicated in private, leaving him unable to take inconsistent positions in the future. Finally, the example of the Act, plaintiff asserts, will limit free expression by and to political figures in the future. Although these arguments vary somewhat in content as well as in coherence and plausibility, it should be clear that the grava-

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[64] Plaintiff also claims to be able to assert the constitutional rights of third parties whose privacy interests may be invaded by processing under the Act. He does not indicate why it is that he should be able to assert these third party rights, *see generally* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974), but we do not believe that we must face the sometimes tricky issue of standing. *Cf.* Ripon Soc'y v. National Repub. Party, Nos. 74-1337, 74-1358 (D.C. Cir. Sept. 30, 1975) (en banc), manuscript slip. op. at 25 n.28. For even were we to assume *arguendo* that such an assertion was appropriate, we would find that the infringement of any other individual's privacy to be far less global and equally well-justified so as to be an *a fortiori* case.

men of each of them is the harm to Mr. Nixon's First Amendment interests caused by disclosure of the materials so as to violate his associational privacy.

It is undisputed that the First Amendment's protection of freedom of expression encompasses association for the advancement of political ideas. *E.g., Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. Where an infringement of associational freedom can be shown, the government bears the burden of showing that the action it defends serves a compelling government interest that cannot be promoted in a less restrictive way. *E.g., Kusper v. Pontikes, supra*, at 58-59; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Mr. Nixon invokes this established First Amendment doctrine in pressing his claim.

This contention is in its structure not very different from the Fourth Amendment question we have just discussed. It too is limited to the constitutionality of a screening process necessary to classify and categorize materials only some of which implicate Mr. Nixon's constitutionally protected interest in associational privacy. There are, undoubtedly, some materials mingled among the great bulk that truly implicate Mr. Nixon's ability to associate in private in order to advance political ideas, and the fraction of these as compared to the total is unlikely to differ substantially in size from that fraction implicating his Fourth Amendment interests. *See* pp. 69-71 *supra*. Here, too, Mr. Nixon may have in effect waived his right to invoke freedom of association with respect to certain portions of the materials which he earlier dis-

closed. *Cf.* pp. 41-42, 71 *supra*. And although the great bulk of the materials appear to be unrelated to Mr. Nixon's constitutional interests, he appears to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening took place. *See* pp. 72-75 *supra*.

The allegations of infringement of rights here, however, are predicated on the assumption that all materials will be opened to public access without any protection of plaintiff's constitutional interest in, *inter alia*, associational privacy. *See* Plaintiff's Brief at 144, 149, 150-52; Reply Brief at 60-62. This is an assumption, as noted above, which we have no reason to accept or to base a ruling upon.[65] Hence, we need not resolve the debate

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[65] The Proposed Regulations, *supra* note 13, mandate restrictions on public access to materials implicating "personal privacy." *See* note 52 *supra*. We believe that it is entirely possible to read personal privacy so as to include the privacy in political association protected by the First Amendment, and, if this were the case, then these regulations would be inconsistent with plaintiff's assumption.

The intervenor-defendants include journalists whose interest would seem to lie in the broadest immediate disclosure of all materials of interest to the reading public. Yet at the oral argument on the merits of this case, certain of their counsel conceded that some materials would fall within the protection of the First Amendment. Mr. Herzstein suggested three possible meanings of "political materials": first, those relating to the abuse of government power for political purposes; second, those relating to the exercise of political influence and national leadership in the national interest as perceived by the Chief Executive; and third, truly personal political activity. Transcript at 71-72. The record proceeds as follows:

> Mr. Herzstein: . . . If Mr. Nixon was a member of the ACLU or the John Birch Society or the Republican Party, his personal involvement with that organization,

between plaintiff, on the one hand, and defendants and any intervenor-defendants, on the other, as to whether the kinds of burdens Mr. Nixon alleges are cognizable and not excessively speculative. For we believe that any burden arising solely from review by professional and discreet archivists is not significant, and certainly not significant enough to outweigh countervailing government interests. Mr. Nixon's freedom to continue to express himself on public issues will not be impaired if a handful of government archivists privately know the contents of materials in which plaintiff may or may not have taken inconsistent positions. Similarly, that private knowledge of archivists will not deter individuals with whom Mr. Nixon has associated (or would like to associate) from participating with him in political activities. For these reasons, we do not believe that the Act will in any significant way chill association by or with future presidents. *Cf.* pp. 42-46 *supra*. Finally, there is no showing here of the kinds of sanctions, coercion, harassment, or other oppression that characterized such cases as *NAACP v. Alabama ex rel. Patterson*, *supra*, at 462,

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to the extent it involved no connection with his use of his public office, then we feel that is a personal record.

Judge McGowan: That could be left out.

Mr. Herzstein: And that could be left out, that's right.

Id. at 72. Counsel for another of the groups of intervenors indicated his agreement:

Mr. Friedman: . . .

I would start right out by agreeing that there is some material in this group which would be protected by the First Amendment. Mr. Herzstein referred to personal associations of Mr. Nixon, a list of his own personal political contributions, a list of whom he voted for in his entire life, all of that would be protected by the First Amendment.

Id. at 74.

and *Bates v. Little Rock*, *supra*, at 523-24, in which the doctrine of associational freedom was first developed, and that more recently were accorded considerable significance by another three-judge court in this district, *see* Order of October 22, 1975 in *Doe v. Martin*, Civil No. 75-0083, at 3-14. Rather, this case is not unlike *Buckley v. Valeo*, *supra*, where the court of appeals in this circuit considered whether auditing provisions of the Federal Election Campaign Act that authorize the Federal Election Commission to inspect but not to disclose confidential records of political contributions violate the First Amendment. The court there held that "the confidential status of those records precludes any claim of real or threatened injury to plaintiff's First Amendment interests arising from public disclosure." 519 F.2d at 865. Plainly put, plaintiff has provided us with no reason to believe that screening by government personnel, by itself, undermines his First Amendment freedoms. *See also California Bankers Ass'n v. Shultz*, 416 U.S. 21, 51-52, 56-57 (1974). And since, as was noted earlier, the Act is a legitimate and not unnecessarily restrictive means of furthering government interests of great importance, we find no basis whatsoever for upholding Mr. Nixon's challenge to the Act on First Amendment grounds.[66]

VI. Equal Protection

Mr. Nixon challenges the Act on the ground that, by singling out the papers accumulated during his tenure in office, it denies him the equal protection of the law. We believe, however, that there is adequate justification for the difference in treatment between him and other Presidents. His papers were in a unique status. Those

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[66] Insofar as plaintiff purports to assert the rights of third parties, we find such a claim to be without merit, for reasons discussed in note 64 *supra*.

of his latter-day predecessors in office had already been deposited in presidential libraries, *see* p. 43 *supra*, and were, therefore, available (albeit on a restricted basis in some cases) to historians, the public, and the three branches of government. The papers of his successors were yet to come into being or, in the case of President Ford, still in active use by the incumbent administration. Legislating with respect to Mr. Ford might have directly and adversely affected executive policymaking. *Cf.* p. 38 *supra*. Legislating with respect to any future President might have been unwise when the considered study by the Commission established by Title II of the Act of the sensitive, complex, and often technical questions relating to government documents had not been completed. *See* 120 CONG. REC. S 18244-45 (daily ed. Oct. 3, 1974) (remarks of Sen. Javits); *id.* at H 11208 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas); *id.* at H 11212 (statement of Rep. Bingham). Only Mr. Nixon was in the intermediate status of having terminated his service as President but not yet having established a presidential library.

Mr. Nixon has emphasized that the materials would have been preserved for at least three years under the Nixon-Sampson agreement. The implication is that there was no urgent need for immediate governmental control or for singling out plaintiff; during that period, Mr. Nixon might have established a presidential library, making him like past Presidents of the modern era, or the Commission might have finished its work, enabling Congress to apply the same standards to him and to future Presidents. This argument, we believe, misses the point. The possibility existed that Mr. Nixon and the GSA might decide to amend the agreement so as to foreshorten the three-year period. Even within the course of three years' time, there was no assurance either that Mr. Nixon would plan to establish a presidential library or that the

Commission would have completed a study that would be translated into law. Indeed, at this date—over 15 months after the Nixon-Sampson agreement was formed—the Commission's first meeting has just been held, although its report to the President and Congress is to be transmitted no later than March 31, 1976, *see* 44 U.S.C.A. § 3322 (Supp. I, Feb. 1975). Although Mr. Nixon has asserted that he intends to establish a presidential library at the University of Southern California, *see* Nixon Affidavit at 19; Affidavit of John R. Hubbard at 1-2, no binding arrangements have yet been made.[67]

In addition, there was a distinct disadvantage to waiting for the completion of the Commission's report: in the interim, no progress could be made in the lengthy process of reviewing, classifying, and housing the materials so that they might become available for a variety of uses. On the assumption that processing could begin in the spring of 1976, GSA estimates that the materials whose review would receive first priority would not be fully processed until the fall of 1979. The first priority materials comprise only 21% of the total, and although the other 79% can be processed more quickly, they would receive no attention, except for initial shelving and arranging, until the 1980s. *Senate Hearings on GSA Regulations* at 115-19. Similarly, the tape recordings would not be fully processed until the end of 1979. *Id.* at 132. The examples in the record of requests from a variety of individuals or agencies for access to materials in presi-

[67] It is of course understandable that no final arrangements could be made given the uncertainty, generated by the passage of the Act and by this and other litigation, about the nature of Mr. Nixon's rights and interests in the materials. Nonetheless, it is noteworthy that not only were there no binding plans at the time that the Act was passed, but that investigation of the possibility of establishing a library at USC began only after the passage of the Act. *See* Affidavit of John R. Hubbard at 1.

dential libraries having to be refused merely because processing had not been completed [68] indicates the importance of beginning the lengthy processing period as promptly as possible, so that access to the materials by the public or by government officials would not be unduly delayed.

Finally, as noted above, *see* pp. 46-48 *supra*, Congress had before it an adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials at issue. This aspect of the case provides a basis for distinguishing him from other Presidents, whose inclination to serve important public interests in disposing of such materials Congress had less reason to question. It also reinforces the dangers of deferring congressional action in the event that the agreement were amended, or, after three years' time, no satisfactory arrangements for a presidential library existed and the Commission report was not completed or acted upon. We believe that this additional factor makes even clearer what is already apparent, namely, that there was adequate justification for according different treatment to these materials than to those accumulated during other Presidential administrations. *See also* note 35 *supra*.

Mr. Nixon also suggests that the Act must be subjected to heightened scrutiny and requires compelling justifications because it infringes his fundamental interest both in free speech and association and in privacy. The first of these interests has already been discussed in its own right, as the protections of the First Amendment apply directly to the case, and we found the in-

[68] *See* Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson, at 2; Affidavit of Harry J. Middleton at 3-4 & exhs. A, B; Letter of July 23, 1975 from Benedict K. Zobrist, Director of the Truman Library, to R. Stan Mortenson, at 1-2; Affidavit of William R. Emerson, July 22, 1975, exh. I.

fringement of expressive interests to be insubstantial and amply justified. That analysis, we believe, is fully dispositive of any equal protection claim resting upon so-called strict scrutiny. *See, e.g., Police Dept. v. Mosley*, 408 U.S. 92, 94-102 (1972); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29-30; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 153-55 & nn. 36, 39 (1974). As for the privacy claim, Mr. Nixon provides no authority indicating that the kind of privacy interests whose protection he seeks has heretofore been provided under the equal protection clause, and we know of none; but even if such authority existed we believe once again that the analysis above of the infringement of those interests, as compared to the furtherance of important legislative objectives, disposes of his claim.

VII. BILL OF PAINS AND PENALTIES

Article I, section 9, clause 3 of the Constitution prohibits the legislature from enacting a bill of attainder, which is a legislative determination of guilt and imposition of punishment upon a specified group or specified individuals without the safeguards of a judicial trial. *E.g., United States v. Brown*, 381 U.S. 437, 441-46 (1965); *id.* at 462-64 (White, J., dissenting); *Flemming v. Nestor*, 363 U.S. 603, 613 (1960); *id.* at 627 (Black, J., dissenting); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion); *United States v. Lovett*, 328 U.S. 303, 315-17 (1946); *id.* at 321-22 (Frankfurter, J., concurring). Strictly speaking, an act is a bill of attainder when the punishment is death, and a bill of pains and penalties when the punishment is less severe, but both kinds of punishment have been held to fall within the scope of the constitutional prohibition. *E.g., United States v. Lovett, supra*, at 323-24 (Frankfurter, J., concurring); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

Plaintiff's argument that the Act is a bill of pains and penalties rests primarily upon the general political atmosphere asserted to exist at the time the legislation was passed. As Mr. Nixon describes it, there was a period of great political turbulence during and following "Watergate": congressional inquiries had generated widespread allegations of misconduct; articles of impeachment had been recommended by a House committee; and in the wake of that recommendation there followed a presidential resignation. A presidential pardon granted Mr. Nixon by his successor generated enormous controversy and, on the part of some legislators, anger, frustration, and a determination not to let the pardon prevent airing of the whole Watergate affair to the public. In light of these circumstances, plaintiff asserts that the Act was designed to punish him for the wrongdoing that was alleged, and hence falls within the bill of attainder clause. Plaintiff's Brief at 195-205; Plaintiff's Reply Brief at 63-66.

Assuming *arguendo* that this characterization of legislative sentiment is accurate, we believe it falls far short of making out a meritorious bill of attainder claim. Congress may often be angered or frustrated by executive decisions, and may often attempt to bring to the notice of the public information bearing upon allegations of wrongdoing by government officials. Whether or not such congressional activity is likely to represent a wise exercise of legislative power, it is not automatically punitive in character. And when plaintiff moves from asserting the existence of anger and frustration to asserting punitive motivation, he uniformly fails to adduce any evidence from the legislative record or otherwise to support his contention.[69] Surely not any piece of legislation, or

[69] For example, after providing citations to various statements by members of Congress and to newspaper articles designed to support plaintiff's characterization of the political atmosphere, Plaintiff's Brief at 198 shifts to the statement that "[m]any in Congress perceived the legislation as the only way in which they could exact a penalty which they felt was due," without any support whatsoever for that statement. The next sentence, insisting that the Act and the debates preceding its passage indicate a congressional design to inflict punishment upon an individual thought to be guilty of criminal acts, stands similarly unsupported. What follows in the brief indicates little more than a legislative desire to obtain the whole truth about Watergate in part because the pardon of Mr. Nixon had prevented criminal proceedings from serving that role, *id.* at 199; this legislative objective is not illegitimate or necessarily punitive, *see* p. 58 & note 16 *supra*. The brief proceeds further by again leaping to a conclusion—that the "tone of anger and the conclusions of guilt" in the debates reveal a punitive purpose, Plaintiff's Brief at 200, without any support for that allegation. Similarly, a congressional recitation of alleged wrongdoings, *see id.* at 202; Reply Brief at 63-65, can reflect legitimate legislative considerations, *see* pp. 46-48 *supra*, as easily as punitive motivation, and once more plaintiff fails to document or demonstrate the latter.

any piece of legislation more or less related to "Watergate," that was passed during times that Mr. Nixon asserts were turbulent must be found unconstitutional on bill of attainder grounds. Whether it is depends upon a demonstration of punitive intent or character, and that demonstration is patently lacking here.

The test of whether a legislative enactment is punitive in nature has been variously stated. To some extent it has rested upon whether there exist other, non-punitive, purposes that may plausibly be assigned to the legislation, *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *Trop v. Dulles*, 356 U.S. 86, 107-10 (1958) (plurality opinion);[70] *Cummings v. Missouri*,

[70] Strictly speaking, neither *Mendoza-Martinez* nor *Trop* involved a bill of attainder claim. However, in both cases, the issue was quite similar to such a claim; in *Mendoza-Martinez*, whether a statute which automatically imposes forfeiture of citizenship, without judicial or administrative proceedings, is

supra, at 319-20, and in this case, as we have already noted, we find such alternative purposes plainly present. *See* pp. 49-61 *supra*. A similar test, and one whose application leads to the same conclusion, is that indicated in *Flemming v. Nestor*, *supra*, at 614, *quoting De Veau v. Braisted*, *supra*, at 160 (plurality opinion):

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.
>
> . . . .
>
> "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession."

There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a *penalty* upon *Mr. Nixon*, by depriving him of custody and control of the disposition of the materials at issue, as punishment for alleged

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penal in character and hence deprives individuals of citizenship rights without due process of law and other safeguards, 372 U.S. at 164; in *Trop*, whether denationalization may be inflicted as a punishment, 356 U.S. at 94. Both decisions relied in part upon bill of attainder precedents, and we find nothing in them to indicate that the nature of their determination of whether punishment was imposed by legislative act differs from that determination in bill of attainder cases.

past wrongdoings.[71] There is, however, ample evidence that Congress cared about *regulating* how the *materials* would be treated in *the future* in order to ensure that such treatment will be consistent with Congressional perceptions of the public interests. *See* pp. 48-61 *supra*.[72] Moreover, in determining whether depriving Mr. Nixon of absolute control of the materials constitutes punishment, other indicators—whether the deprivation has historically been regarded as punishment, whether it comes into effect only upon a finding of scienter, and whether the behavior to which it applies is already a crime, *Kennedy v. Mendoza-Martinez*, *supra*, at 168; whether the deprivation seems especially severe in context, *id.* at 169; *Cummings v. Missouri*, *supra*, at 317-18—also point toward a negative conclusion. Control over processing of presidential materials has not traditionally been associated with either crime or punishment, and the operation of the Act in no way depends on the scienter of Mr. Nixon or anyone else. Moreover, in relation to the congressional purposes, the Act could not have been drawn more narrowly, *see* pp. 62-63 *supra*, and any effect on Mr. Nixon cannot be thought, in context, to be at all severe, or unnecessary, or merely punitive. The legislative history leads to only one conclusion, namely,

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[71] Congress may well have relied in part upon the allegations of wrongdoing by Mr. Nixon as a basis for treating him differently from other Presidents. As a theoretical matter, such reliance is equally consistent with (1) a desire to punish for past wrongdoing and (2) a desire to regulate the future treatment of the presidential materials. As a factual matter, such reliance appears from the legislative record to have been motivated by the second concern alone. *See* pp. 48-61 & note 69 *supra*.

[72] That evidence, together with the ample basis for a congressional decision to treat Mr. Nixon somewhat differently from other presidents, *see* pp. 93-97 *supra*, suggests that the Act's singling out Mr. Nixon is of no special significance with respect to allegations that the Act constitutes punishment.

that the Act before us is regulatory and not punitive in character.

That conclusion is reinforced by specific aspects of the Act that just do not square with the claim that the Act was a punitive measure. Section 102(b) of the Act gives Mr. Nixon as well as other individuals the right to contest any legal process directed to the materials by asserting any rights, defenses, or privileges he may have. Section 102(c) provides him or his designees with a right of access at all times to all materials covered by the Act. Section 104(a) directs the Administrator, in promulgating regulations, to consider both the need to protect any party's opportunity to assert any legal or constitutional right or privilege (subsection 5), and the need to give to Mr. Nixon or his heirs, for his or their sole custody and use, any tape recordings or materials whose preservation is unnecessary to further legislative ends (subsection 7). Section 105(a) provides for jurisdiction and expedited treatment of various claims arising under the Act, and was designed in part to provide plaintiff with an expedited route to follow in seeking to protect any rights he believed had been infringed, *see* 120 CONG. REC. S 18239 (daily ed. Oct. 3, 1974) (remarks of Sen. Ervin). Section 105(c) provides for payment of compensation to any individual who is found to have been deprived of private property by the operation of the Act. Provisions such as these are not the trappings of a punitive and vindicative enactment.[73] Finally, the establishment in Title II of a Commission to study records of federal officials reflects Congress' perception of a genuine regulatory problem and the need for action to solve that problem in the future. Even if it could

[73] Indeed, the legislative record contains numerous references to the need to protect plaintiff's constitutional rights under the Act. *See, e.g.*, S. REP. No. 93-1181, 93d Cong., 2d Sess., at 2-3, 4-5, 5-6 (1974); pp. 24-25 *supra*.

plausibly be alleged that a legislature whose design was to punish would choose as the penalty deprivation of control over these original materials—surely an odd form of punishment—it strains credulity to argue that the deprivation of control, in the context of and as limited by these specific statutory provisions, was intended to inflict punishment within the reach of the bill of attainder clause.

The approach of the Bicentennial Year has already seen a widening appreciation of the importance of the preservation of our historical heritage. It seems inevitable that Congress would, sooner or later, address itself to the formulation of a uniform policy with respect to the disposition of the papers of presidents and other significant functionaries of the federal government.

Had the Act before us been fully prospective, it seems fair to say that non[illegible]f the constitutional problems dealt with hereinabove would have been serious. Mr. Nixon, however, served as President for over five years in a highly eventful period, accumulating vastly more papers illuminative of his time in office than any other President. Moreover, his tenure of the office ended under extraordinary circumstances which have themselves become an important fact of our national history, and which brought sharply into focus the need for Congress to make a start upon the articulation of a coherent policy of records preservation. To start with Mr. Nixon himself was surely not an irrational determination, but it presents problems which both the face of the Act and its legislative history show Congress to have been keenly aware of.

We do not believe those problems to be such as to justify stopping the Act in its tracks, given its scheme of implementation by regulations in the writing of which

Congress itself has retained a role. But sensitivity to constitutional protections cannot end with the adoption of the Act itself. It must permeate, in both regulation and practice, the effectuation of the Act as well.

Although we hold that the facial constitutionality of the Act requires dismissal of the complaint, we think it appropriate, pending the final disposition of any appeal plaintiff may deem it advisable to take, to enjoin any processing or disclosure of the materials in question except for the very limited purposes hereinafter appearing.

APPENDIX A

(CAPTION OMITTED IN PRINTING)

(FILED APRIL 1, 1976)

Order

It is ordered by the Court *sua sponte* that the Opinion and Order of January 7, 1976, in the above-captioned case be and hereby is amended as follows:

1. On page 14, the last line of footnote 8, the section "105.63.101-.303" should be "105-63.101-.303".

2. On page 48, lines 17 and 18 of footnote 35, for the phrase "eventual access to particular materials by," substitute the phrase "making the materials available within the shortest possible time to".

3. On page 54, line 6, after the word "practice.", insert the following two sentences: "As is described in detail in note 1 *supra*, the materials which plaintiff claims the right to control include vital information relating to domestic policy-making conducted entirely within the White House or by the White House in conjunction with executive agencies, and records of communications with foreign governments or White House communications with executive agencies concerning foreign affairs. Much of this information is contained only in the materials under dispute in this case."

4. On page 60, lines 21 and 22 of footnote 46, the phrase "the fact that disclosure was opposed by the Special Prosecutor because it might prejudice pending criminal prosecutions," should be "at least in the view of the District Court, disclosure might have prejudiced pending criminal prosecutions,".

5. On page 63, the last line, after the word "overbroad. 49", insert the following two sentences: "Moreover, it was necessary for Congress not merely to take custody of

the materials, but also to ensure that their processing commenced promptly so that, to the maximum extent possible, the numerous requests for access to materials that had already been received, *see* notes 41, 45 *supra*, or could reasonably be expected, would not have to be denied (as had happened in the past, *see* sources cited note 68 *infra*) merely because the requested materials had not been processed. *See* pp. 95-96 *infra.*''

6. On page 65, the last line of footnote 49, the word ''constitutionally'' should be ''constitutionality''.

7. On page 77, the second line from the bottom of footnote 56, the phrase ''searches take'' should be ''a one-time search takes''.

8. On page 80, line 10, after the word ''according'' insert the word ''to''.

9. On page 96, line two, the word ''indicates'' should be ''indicate''.

10. On page 96, line six, after ''delayed.'', add *''See also* notes 41, 45 *supra.''*.

/s/ Carl McGowan
Carl McGowan
United States Circuit Judge

/s/ Edward A. Tamm
Edward A. Tamm
United States Circuit Judge

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

Date: April 1, 1976

APPENDIX B

Order

In acordance with the foregoing opinion, it is this 7th day of January, 1976.

Ordered that the preliminary and permanent injunctive relief prayed for by plaintiff is denied and the complaint dismissed as without merit; and, pending the final disposition of any appeal from this decision, it is

Further Ordered that the defendants, their superiors, agents, and assigns are hereby enjoined from processing, disclosing, inspecting, transferring, or otherwise disposing of any materials, be they documents, papers, tape recordings or other items, which might fall within the coverage of sections 101(a), (b) of the Presidential Recordings and Materials Preservation Act and which are now or may in the future be in their custody, except as is specifically provided hereinafter; and it is

Further Ordered that this injunction shall not bar production of materials pursuant to any subpoena or other lawful process in accordance with the procedures established in 41 C.F.R. §§ 105-63.201 to .207, .303; and it is

Further Ordered that Mr. Nixon or his designated agent shall at all times have access to the materials in accordance with 41 C.F.R. §§ 105-63.201 to .207, .301, and shall have the right to obtain photographic reproductions of any documentary material; and it is

Further Ordered that only the defendants or their agents shall undertake to reproduce any materials, and shall not permit any other person to do so; and it is

Further Ordered that the injunction shall not bar inspection and photographic reproduction of documentary material when needed for current business of the executive branch of the federal government, pursuant to a request

that has been approved by both the head of the agency or department of the executive branch seeking access and by defendant Philip W. Buchen or his successor, although plaintiff shall receive notice of any access requested ten days prior to the grant thereof in order to be able to raise in court any defenses, rights, or privileges that might bar such access, and if such opposition is presented, defendants shall not permit access until the issue has been resolved in court, and any such access granted shall be in accordance with the procedures of 41 C.F.R. §§ 105-63.201 to .207; and it is

FURTHER ORDERED that this court will retain jurisdiction of this case in order to consider whatever additions, deletions, or changes in this order might be deemed appropriate.

/s/ CARL MCGOWAN
Carl McGowan
United States Circuit Judge

/s/ EDWARD A. TAMM
Edward A. Tamm
United States Circuit Judge

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
U.S. District Judge

January 7, 1976

APPENDIX C

(CAPTION OMITTED IN PRINTING)

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Richard Nixon, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order in this action on January 7, 1976 denying plaintiff's request for a preliminary and permanent injunction and dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ RAYMOND G. LARROCA
Raymond G. Larroca

/s/ WILLIAM H. JEFFRESS, JR.
William H. Jeffress, Jr.

/s/ R. STAN MORTENSON
R. Stan Mortenson

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
Counsel for Plaintiff

DATED: March 4, 1976

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

APPENDIX D

Public Law 93-526

NINETY-THIRD CONGRESS OF THE UNITED STATES OF AMERICA
AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

Delivery and Retention of Certain Presidential Materials

Sec: 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the "Administrator") shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

Availability of Certain Presidential Materials

Sec. 102. (a) None of the tape recordings or other materals referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpena or other legal process. Any request by the Office of Watergate Special Prosecution Force, whether by court subpena or other lawful process, for access to such

recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

Regulations to Protect Certain Tape Recordings and Other Materials

Sec. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

Regulations Relating to Public Access

Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of

governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any changes in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5)(A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An amendment to such motion is not in order, and it is not in

order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a)(7).

(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

SEC. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such chal-

lenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

AUTHORIZATION OF APPROPRIATIONS

SEC. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

TITLE II—PUBLIC DOCUMENTS COMMISSION

SHORT TITLE

SEC. 201. This title may be cited as the "Public Documents Act".

ESTABLISHMENT OF STUDY COMMISSION

SEC. 202. Chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3315. Definitions

"For purposes of this section and section 3316 through section 3324 of this title—

"(1) the term 'Federal official' means any individual holding the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, or any officer of the executive, judicial, or legislative branch of the Federal Government;

"(2) the term 'Commission' means the National Study Commission on Records and Documents of Federal Officials; and

"(3) the term 'records and documents' shall include handwritten and typewritten documents, motion pictures, television tapes and recordings, magnetic tapes, automated data processing documentation in various forms, and other records that reveal the history of the Nation.

"§ 3316. Establishment of Commission

"There is established a commission to be known as the National Study Commission on Records and Documents of Federal Officials.

"§ 3317. Duties of Commission

"It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation. Such study shall include consideration of—

"(1) whether the historical practice regarding the records and documents produced by or on behalf of

Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all Federal officials;

"(2) the relationship of the findings of the Commission to the provisions of chapter 19 of this title, section 2101 through section 2108 of this title, and other Federal laws relating to the control, disposition, and preservation of records and documents of Federal officials;

"(3) whether the findings of the Commission should affect the control, disposition, and preservation of records and documents of agencies within the Executive Office of the President created for short-term purposes by the President;

"(4) the recordkeeping procedures of the White House Office, with a view toward establishing means to determine which records and documents are produced by or on behalf of the President;

"(5) the nature of rules and procedures which should apply to the control, disposition, and preservation of records and documents produced by Presidential task forces, commissions, and boards;

"(6) criteria which may be used generally in determining the scope of materials which should be considered to be the records and documents of Members of the Congress;

"(7) the privacy interests of individuals whose communications with Federal officials, and with task forces, commissions, and boards, are a part of the records and documents produced by such officials, task forces, commissions, and boards; and

"(8) any other problems, questions, or issues which the Commission considers relevant to carrying out its duties under section 3315 through section 3324 of this title.

"§ 3318. Membership

"(a)(1) The Commission shall be composed of seventeen members as follows:

"(A) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the majority leader of the House;

"(B) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the minority leader of the House;

"(C) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the majority leader of the Senate;

"(D) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the minority leader of the Senate;

"(E) one Justice of the Supreme Court, appointed by the Chief Justice of the United States;

"(F) one person employed by the Executive Office of the President or the White House Office, appointed by the President;

"(G) three appointed by the President, by and with the advice and consent of the Senate, from persons who are not officers or employees of any government and who are specially qualified to serve on the Commission by virtue of their education, training, or experience;

"(H) one representative of the Department of State, appointed by the Secretary of State;

"(I) one representative of the Department of Defense, appointed by the Secretary of Defense;

"(J) one representative of the Department of Justice, appointed by the Attorney General;

"(K) the Administrator of General Services (or his delegate);

"(L) the Librarian of Congress;

"(M) one member of the American Historical Association, appointed by the counsel of such Association;

"(N) one member of the Society of American Archivists, appointed by such Society; and

"(O) one member of the Organization of American Historians, appointed by such Organization.

"(2) No more than two members appointed under paragraph (1) (G) may be of the same political party.

"(b) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

"(c) If any member of the Commission who was appointed to the Commission as a Member of the Congress leave such office, or if any member of the Commission who was appointed from persons who are not officers or employees of any government becomes an officer or employee of a government, he may continue as a member of the Commission for no longer than the sixty-day period beginning on the date he leaves such office or becomes such an officer or employee, as the case may be.

"(d) Members shall be appointed for the life of the Commission.

"(e)(1) Members of the Commission shall serve without pay.

"(2) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses in the same manner as persons employed intermittently in the service of the Federal Government are allowed expenses under section 5703(b) of title 5, United

States Code, except that per diem in lieu of subsistence shall be paid only to those members of the Commission who are not full-time officers or employees of the United States or Members of the Congress.

"(f) The Chairman of the Commission shall be designated by the President from among members appointed under subsection (a)(1)(G).

"(g) The Commission shall meet at the call of the Chairman or a majority of its members.

"§ 3319. Director and staff; experts and consultants

"(a) The Commission shall appoint a Director who shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5315).

"(b) The Commission may appoint and fix the pay of such additional personnel as it deems necessary.

"(c)(1) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

"(2) In procuring services under this subsection, the Commission shall seek to obtain the advice and assistance of constitutional scholars and members of the historical, archival, and journalistic professions.

"(d) Upon request of the Commission, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist it in carrying out its duties under sections 3315 through 3324 of this title.

"§ 3320. Powers of Commission

"(a) The Commission may, for the purpose of carrying out its duties under sections 3315 through 3324 of this title,

hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission may deem desirable.

"(b) When so authorized by the Commission, any member or agent of the Commission may take any action which the Commission is authorized to take by this section.

"(c) The Commission may secure directly from any department or agency of the United States information necessary to enable the Commission to carry out its duties under section 3315 through section 3324 of this title. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.

"§ 3321. Support services

"(a) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services and assistance as the Commission may request.

"(b) The Archivist of the United States shall provide to the Commission on a reimbursable basis such technical and expert advice, consultation, and support assistance as the Commission may request.

"§ 3322. Report

"The Commission shall transmit to the President and to each House of the Congress a report not later than March 31, 1976. Such report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation, administrative actions, and other actions, as it deems appropriate.

"§ 3323. Termination

"The Commission shall cease to exist sixty days after transmitting its report under section 3322 of this title.

"§ 3324. Authorization of appropriations

"There is authorized to be appropriated such sums as may be necessary to carry out section 3315 through section 3324 of this title.".

TECHNICAL AMENDMENT

SEC. 203. The table of sections for chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new items:

"3315. Definitions.
"3316. Establishment of Commission.
"3317. Duties of Commission.
"3318. Membership.
"3319. Director and staff; experts and consultants.
"3320. Powers of Commission.
"3321. Support services.
"3322. Report.
"3323. Termination.
"3324. Authorization of appropriations.".

/s/ CARL ALBERT
Speaker of the House of Representatives.

/s/ LEE METCALF
Acting President of the Senate pro Tempore.

APPENDIX E

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

Text of a Legal Opinion by the Attorney General

September 6, 1974

The President.
The White House.

Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In *Folsom* v. *Marsh*, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D., Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his

official correspondence,[1] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2] A classic exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through

[1] The official documents involved in the case were:

Letters addressed by Washington, as commander-in-chief, to the President of Congress.

Official letters to governors of States and speakers of legislative bodies.

Circular letters.

General orders.

Communications (official) addressed as President to his Cabinet.

Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105. The clear holding on the property point (*Id.* at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (*Id.* at 114).

[2] Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, *To provide for the acceptance and maintenance of Presidential libraries, and for other purposes* (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"), Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

> it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, *The Presidency* 30-31 (1916).

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. *See* 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915):

> [G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation. *Id.* at 472-73.
>
> . . .
>
> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. *Id.* at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential

Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials—whether personal or official—which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the President of the United States." Section 507 (e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3] The corresponding provision of the current law, however, 44 U.S.C. 2107 (1), avoids the ambiguity. It envisions the President's deposit of *all* Presidential materials, not only personal ones. During the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents—Hoover, F.D. Roosevelt, and Harry Truman—have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

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[3] Compare Section 507 (e) with Section 507 (a), dealing with the records of an agency. A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on July 24, 1951 indicated that such a distinction between private and official Presidential papers would be inconsistent with historic precedents, and difficult if not impossible to maintain. It accordingly regarded the Records Act's use of the term "personal" as intended merely to exclude the permanent files of the Chief Executive Clerk discussed at page 12 [131a] below.

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Governmental Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their personal property; and the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." *Id.* at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one

assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times"—at least, what most people would reckon to be emoluments. Corwin, *The President* 348 N. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. *Id.* at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it—S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in

Folsom v. *Marsh, supra,* Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when they are within the possession of the former President.[4] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devoted to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946 *Matter of Roosevelt,* 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); *Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library* (1947) p. 1, Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar

[4] Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administra-

tion to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without more extensive factual and historical inquiry which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials; Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . . ." Fed. R. Crim. P. 16 (b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). *See, e.g., Couch* v. *United States,* 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), *cert. denied,* 352 U.S 833; *United States* v. *Re,* 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Attorney General

APPENDIX F

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D. C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate to the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions, for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, *et seq.*, all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia, subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.
2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.
3. I retain all legal and equitable title to the Materials, including all literary property rights.
4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108(f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.
6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.
7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:
   A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written

authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right of access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass

any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the information on the tapes.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of an appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no dimunition of the Administrator's responsibility to protect and secure the Materials

from loss, destruction, unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropriate restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,

/s/ RICHARD NIXON

Accepted by:

/s/ ARTHUR F. SAMPSON
Arthur F. Sampson
Administrator
General Services Administration

9/7/74

APPENDIX G

Richard NIXON, Petitioner,

v.

Hon. Charles R. RICHEY, United States District Court for the District of Columbia, Respondent.

No. 75–1063.

United States Court of Appeals,
District of Columbia Circuit.

Jan. 31, 1975.

Before ROBINSON and WILKEY, Circuit Judges.

ORDER

On consideration of petitioner's petition for writ of mandamus, for expedited consideration thereof, and of the responses by the parties, to the petition, it is

Ordered by the Court that the aforesaid petition is denied for the reasons and on the conditions stated in the attached *Per Curiam* opinion.

PER CURIAM:

On December 20, 1974, petitioner brought suit in the District Court to enjoin enforcement of the Presidential Recordings and Materials Preservation Act, Pub.L. No. 93–526, 88 Stat. 1695 (1974). That Act undertakes to provide for governmental retention of the Presidential materials of petitioner, including the White House tape recordings. Simultaneously with the filing of the complaint, petitioner applied for the convening of a three-judge court pursuant to 28 U.S.C. § 2282 (1970). The respondent District

Judge, to whom the case was assigned, has not yet ruled on this application.

When the Act was passed and when petitioner filed suit to enjoin its operation, three consolidated cases were pending before the District Judge, all of which addressed disposition of the Presidential materials. The Judge is about to rule on the merits of these three cases and thereby to resolve, at the least, issues as to ownership of the materials and privilege against their disclosure. It appears that at least these two issues are common to the consolidated cases and the suit to enjoin execution of the Act.

On January 28, 1975, petitioner filed in this court a petition for a writ of mandamus. The petition asks that we direct the District Judge to act immediately upon the pending application for a three-judge court, in accordance with 28 U.S.C. § 2284 (1970), and further direct advancement of the case to which it relates on the Judge's calendar in preference to the three consolidated cases as assertedly required by section 105(a) of the Recordings and Materials Act.

Section 2282 provides that a suit to enjoin enforcement of an act of Congress on grounds of federal unconstitutionality be heard and determined by a district court of three judges. An application for the convening of such a court is statutorily entitled to expeditious treatment: "[o]n the filing of the application, [the district judge] shall *immediately* notify the chief judge of the circuit . . .." 28 U.S.C. § 2284(1) (1970) (emphasis supplied). In Svejkovsky v. Tamm, 117 U.S. App.D.C. 114, 326 F.2d 657 (1963), we

held that a district judge erred in staying proceedings in such a case pending the outcome of a Supreme Court case raising the same or similar issues, instead of expeditiously deciding whether to proceed to convene a three-judge court. We stated that "[i]f such a stay is deemed proper here, under § 2284 it should, in any event, be granted by the court of three judges, and not by the single judge who is required to initiate the three-judge proceedings." *Id.* at 115, 326 F.2d at 658. It is to be noted that in *Svejkovsky* the district judge delayed (1) in response to a motion by the Secretary of State, (2) awaiting illumination from the Supreme Court, not from his own pen, and (3) did so in a matter in which there was no statute on the substantive issue involved requiring priority treatment.

Beyond these considerations, the Recordings and Materials Act independently supports petitioner's claim that the District Judge should have acted weeks ago on the three-judge application. Section 105(a) of the Act confers upon the District Court for the District of Columbia "exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title," and specifically provides that "[a]ny such challenge shall be treated by the court as a matter requiring *immediate* consideration and resolution . . .." (emphasis supplied) It is clear that the case for which petitioner sought the three-judge court was a "challenge to the legal or constitutional validity of" the Act. It is equally clear that, as an integral part of his "challenge," petitioner's application for such a court was "a matter requiring

immediate consideration and resolution . . .." In these views, we need not consider contentions by one of the amici curiae that Sections 2282 and 2284 are inoperable in the situation at bar.

The District Judge's response in this court recites his diligence with regard to "the case" and his efforts to "move *it* to a conclusion" (emphasis supplied). The response informs us that "[t]he foregoing litigation, which consumes more than a complete legal-sized file drawer of pleadings, briefs and memoranda of law, has had the constant and almost daily attention of the Court since its inception, ... In fact, two weekends and the Christmas recess were entirely spent right here in this Courthouse working on this very matter." It is apparent, however, from the context and from the 49 pages of docket sheets filed as exhibits, 46 of which deal with the consolidated cases and only three of which deal with the case in which the three-judge court is requested, that the District Judge's efforts have been devoted stupendously to the case in which he is sitting as a single judge, but only meagerly to the requested three-judge court case challenging the constitutionality of the statute inexorably involved in the consolidated cases.

The record discloses beyond peradventure that the District Judge's plan was to complete work on and decide the consolidated cases before taking up the case attacking the Act. This is evident not only from his disproportionate allocations of time and effort but also from a letter he sent to counsel on January 23, 1975. In relevant part the letter stated:

> Due to unforeseeable circumstances, the court's opinion in the consolidated cases is not finished at this time. Until this opinion and order are finished, and the court is hopeful of having it done early next week, the court will not be able to turn its attention to the above-entitled cause. That will be the next order of business.

This plan presents problems beyond even the long overdue consideration of petitioner's three-judge request. Section 105(a) of the Act distinguishes the treatment to be given "challenges to the legal or constitutional validity of this title," on the one hand, and "any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in [the Act] or involving payment of any just compensation which may be due in connection therewith." The section then specifies, not only that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution," as previously discussed, but also that "such challenge shall have priority on the docket of such court over other cases." We have said that the case wherein petitioner seeks a three-judge court was a "challenge" within the contemplation of Section 105(a). We now add that as such it was entitled to priority over the consolidated cases—"other cases" because plainly "action[s] . . . involving the question of title, ownership, custody, possession, or control of" materials embraced within the Act.

Particularly in view of the issues common to all cases, and as well the obvious

bearing of the Act on all cases, if valid, decision of the consolidated cases at this time could compound the difficulties. For if it should later be determined that petitioner's "challenge" must be heard and decided by a court of three judges, that court will be confronted by decisions of a single judge on some of the issues the three judges are summoned to consider. The interests of justice would seem to require that disposition of the consolidated cases be held up at least until until the three-judge question is put to rest. All matters such as petitions to intervene, delay in the issuance of the opinion in the consolidated cases, etc., should properly be settled by the three-judge court.

We recognize and applaud the prodigious effort the District Judge made to dispose of the consolidated cases. But as worthy as it is, it cannot justify departure from the statutory mandate that there be "immediate consideration and resolution" of petitioner's "challenge" to the validity of the Act. Nor does there seem to be any reason why that mandate cannot be observed at once. The District Judge's response states his intention "to press [petitioner's] claim to a conclusion as fast as possible consistent with the ends of justice and convenience of all concerned." The first step in this would be either to convene a three-judge court, requested of the Judge six weeks ago today, or to decide that no three-judge court is called for, a decision which would be immediately appealable by petitioner to this court. We intimate no view as to what in this regard the District Judge should decide. We hold only that he must decide, and decide now.

The propriety of mandamus in the circumstances presented here is undoubted. Svejkovsky v. Tamm, *supra*, 117 U.S. App.D.C. at 115, 326 F.2d at 658. No final action on the petition at hand is necessary, however. We assume that the District Judge, now advised of the relevant law, will proceed in accordance with this opinion. Compare Fine v. McGuire, 139 U.S.App.D.C. 341, 344, 433 F.2d 499, 502 (1970); Reed Enterprises v. Corcoran, 122 U.S.App.D.C. 387, 392, 354 F.2d 519, 524 (1965); Svejkovsky v. Tamm, *supra*, 117 U.S.App.D.C. at 115, 326 F.2d at 658.

An appropriate order will issue.

APPENDIX H

Richard NIXON, Petitioner,

v.

Honorable Charles R. RICHEY, United States District Court for the District of Columbia, Respondent.

No. 75–1063.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 1, 1975.

Decided Feb. 14, 1975.

Before BASTIAN, Senior Circuit Judge, and ROBINSON and WILKEY, Circuit Judges.

PER CURIAM:

Petitioner filed in this court a petition for a writ of mandamus directing a District Judge to immediately grant a pending application for a three-judge court to hear and determine a case challenging the constitutionality of an act of Congress, and instructing the judge to give that case priority over three consolidated cases pending before him as a single judge. In a prior opinion,[1] we held that the judge had to rule on the three-judge application and had to defer the priority question to the three-judge court if convened. We denied the requested writ, however, as unnecessary to compliance with those holdings.

The judge's subsequent release of an opinion, without accompanying order, deciding the consolidated cases has prompted petitioner to seek reconsideration of our earlier refusal of a writ. A three-judge court has now been convened to

1. Nixon v. Richey, 168 U.S.App.D.C. —, 513 F.2d 427 (1975).

initially determine whether it properly should pass on the constitutional challenge, and no further action by us is needed in that regard. Since we had, however, stayed entry of any order implementing the opinion in the consolidated cases, the present controversy relates to whether the stay should be continued.

We find that our stay must remain in effect temporarily for protection of the litigation in which the challenge is made. We leave, as we did before, resolution of the priority question for the three-judge court if it rules that it is to function in that case. Our stay will terminate when the exigencies demanding it disappear. Our reasons for these decisions follow.

I

On December 19, 1974, the Presidential Recordings and Materials Preservation Act[2] became law. Title I of the Act directs the Administrator of General Services to obtain possession and control of specified tape recordings of conversations held, and other historical matter generated, during petitioner's tenure as President of the United States.[3] These the Administrator is to protect and preserve, subject to regulations to be promulgated to govern access by petitioner, governmental agencies and departments,

2. Pub.L. No. 93–526, 88 Stat. 1695 (1974).

3. Presidential Recordings and Materials Preservation Act § 101, 88 Stat. 1695 (1974).

and members of the public.[4] The Act also authorizes payment of just compensation upon a judicial finding that any individual has been deprived of private property by any provision of Title I.[5]

On the day after the Act went into effect, petitioner brought an action in the District Court to enjoin its enforcement permanently on grounds that it transgressed the Federal Constitution.[6] At the same time, petitioner asked that a three-judge court be convened to hear and determine the constitutional claims asserted therein.[7] The case was assigned to the respondent District Judge, the

4. *Id.* §§ 101 to 104, 88 Stat. 1695 (1974). The presidential materials are made amenable to judicial process and available for use in any judicial proceeding, subject to any rights, defenses or privileges the Federal Government or any individual may invoke, with priority to any request therefor by the Office of Watergate Special Prosecution Force. *Id.* § 102(b), 88 Stat. 1696 (1974). Petitioner or his designee is granted access to the materials for purposes consistent with the provisions of Title I, subsequent and subject to the Administrator's regulations. *Id.* § 102(c), 88 Stat. 1696 (1974). Governmental agencies and departments in the Executive Branch are also allowed access subject to the regulations. *Id.* § 102(d), 88 Stat. 1696 (1974).

5. *Id.* § 105(c), 88 Stat. 1698 (1974).

6. Nixon v. Administrator of Gen. Servs., Civ. No. 74–1852 (D.D.C.), filed Dec. 20, 1974.

7. See 28 U.S.C. §§ 2282, 2284 (1970).

Honorable Charles R. Richey, before whom three consolidated cases involving the presidential materials were then pending.[8] The contest in those cases extended to ownership of the materials and privilege against their disclosure, issues also involved in petitioner's constitutional challenge.[9] On January 3, 1975, petitioner moved for a preliminary injunction against operation of the Act.

During the five weeks following institution of the challenge case on December 20, petitioner—on five separate occasions, we are told—requested Judge Richey to initiate the statutory procedure leading to the formation of a district court of three judges.[10] The record re-

8. Nixon v. Sampson, Civ. No. 74–1518 (D.D.C.), filed Oct. 17, 1974; Reporters Comm. for Freedom of the Press v. Sampson, Civ. No. 74–1533 (D.D.C.), filed Oct. 21, 1974; and Hellman v. Sampson, Civ. No. 74–1551 (D.D.C.), filed Oct. 24, 1974.

9. Contentions petitioner advances in the challenge case are predicated upon his own assumptions as to ownership of and privilege respecting the presidential materials.

10. See 28 U.S.C. § 2284(1) (1970).

[illegible] during that period Judge Richey was preoccupied with the consolidated cases,[11] and planned to complete work on them before addressing the challenge case.[12] On January 23, 1975, Judge Richey informed counsel by letter that:

11. In a response submitted to the petition for mandamus, Judge Richey stated that the consolidated litigation "consumes more than a complete legal-sized file drawer of pleadings, briefs and memoranda of law," and "has had the constant and almost daily attention of the Court since its inception. . . ." "In fact," he added, "two weekends and the Christmas recess were entirely spent right here in this Courthouse working on this very matter." The record discloses that in contrast to his diligent efforts in the consolidated cases, Judge Richey devoted virtually no attention to petitioner's suit challenging the validity of the Act.

12. When the Act was signed into law and the challenge suit was filed, motions for a preliminary injunction were pending in the consolidated cases. On October 31, Judge Richey had denied petitioner's motion to consolidate hearings on these motions with trial on the merits, but on November 15, at a hearing on the motions, he had indicated that he might prefer to rule on the merits rather than solely on the issue of preliminary injunctive relief. After passage of the Act, Judge Richey decided upon complete resolution of the consolidated cases, and at his invitation several parties moved for full or partial summary judgment.

> Due to unforeseeable circumstances, the court's opinion in the consolidated cases is not finished at this time. Until this opinion and order are finished, and the court is hopeful of having it done early next week, the court will not be able to turn its attention to the above-entitled cause. That will be the next order of business.[13]

Late in the afternoon of January 28, petitioner filed in this court a petition for a writ of mandamus directing Judge Richey to grant the application for a three-judge court immediately and give the challenge case priority over the consolidated cases.[14] The petition called attention to Judge Richey's letter and its indication that the decision in the consolidated cases was imminent. Recognizing the possible consequence of that action upon petitioner's constitutional challenge, a matter we elucidate later,[15] we gave the matter all the expedition we

13. The letter was written to inform counsel of cancellation of a hearing previously scheduled on petitioner's motion for a preliminary injunction in the challenge case.

14. These requests rested upon 28 U.S.C. §§ 2282, 2284 (1970), and the Presidential Recordings and Materials Preservation Act § 105(a), 88 Stat. 1698 (1974).

15. See Part II, *infra*.

could command. On January 29, we called for responses,[16] by the close of the next day. We deliberated promptly after receipt of the responses, and filed an opinion and order on the morning of January 31.

In our opinion, we concluded that Judge Richey erred in delaying action on the three-judge request[17] and in ignoring the statutory priority[18] of the challenge case.[19] We held that Judge Richey "must decide and decide now," whether to call for a three-judge court,[20] stating carefully that "[w]e intimate[d] no view as to what in this regard [he] should decide."[21] On the matter of priority, we

16. See Fed.R.App.P. 21(b).

17. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 428–429.

18. "The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have pri-

19. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 429.

20. *Id.* at —, 513 F.2d at 430.

21. *Id.*

pointed out the danger of first deciding the consolidated cases,[22] and observed that "[t]he interests of justice would seem to require that disposition of [those] cases be held up at least until the three-judge question is put to rest."[23] We noted specifically that "delay in the issuance of the opinion in the consolidated cases . . . should properly be settled by the three-judge court."[24]

Although thus concluding, and acknowledging the propriety of the mandamus remedy in the circumstances,[25] we saw no occasion for issuance of a writ. "No final action on the petition at hand is necessary," we stated;[26] "[w]e assume that the District Judge, now advised of the relevant law, will proceed in accordance with this opinion."[27] In so doing,

ority on the docket of such court over other cases." Presidential Recordings and Materials Preservation Act § 105(a), 88 Stat. 1698 (1974).

22. "Particularly in view of the issues common to all cases, and as well the obvious bearing of the Act on all cases, if valid, decision of the consolidated cases at this time could compound the difficulties. For if it should later be determined that petitioner's 'challenge' must be heard and decided by a court of three judges, that court will be confronted by decisions of a single judge on some of the issues the three judges are summoned to consider." *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

we adhered to a tradition inspired by a time-proven expectation that judges will perform their duties, once defined, without coercion by judicial process.[28] Correspondingly, our order accompanying the opinion denied a writ of mandamus "for the reasons and on the conditions stated in the" opinion.

We would be less than frank if we failed to observe that we did not anticipate the events which were soon to follow. Our opinion and order issued at approximately 9:45 a. m. on January 31. In line with our custom in expedited cases, our clerk's office telephonically notified Judge Richey at once, and minutes later copies of the opinion and order were hand-delivered to his chambers. At mid-afternoon of the same day, petitioner's motion for reconsideration of our denial of the writ of mandamus officially informed us that an opinion by Judge Richey in the consolidated cases[29] had

28. *E. g.*, Fine v. McGuire, 139 U.S.App.D.C. 341, 344, 433 F.2d 499, 502 (1970); Reed Enterprises v. Corcoran, 122 U.S.App.D.C. 387, 392, 354 F.2d 519, 524 (1965); Svejkovsky v. Tamm, 117 U.S.App.D.C. 114, 115, 326 F.2d 657, 658 (1963).

29. Nixon v. Sampson, 389 F.Supp. 107 (D.D.C. 1975).

been released at 11:00 a. m. The only explanation furnished us is that he had filed the opinion with his courtroom clerk shortly after 2:00 a. m. on that day.[30]

Judge Richey's opinion, a copy of which we later requested, stated that an order of even date would issue.[31] We acted to preserve the status quo by staying temporarily the effectiveness of any order that might have issued, and the entry of any orders in the consolidated cases. We also scheduled a special hearing on the day following, February 1, to better enable a determination as to whether the stay should be left in effect. At the hearing, we entertained argument not only for the parties to the challenge case, but also on behalf of others, as amici curiae, who are parties to the consolidated cases. We learned at the hearing that no order on Judge Richey's opinion had been entered.

30. The events just recited are discussed more fully in Part II, *infra*. The source of our information is two-fold. At 4:31 p. m. on February 12, Judge Richey filed in this court an unsolicited memorandum setting forth "the circumstances surrounding entry of [his] opinion in the consolidated cases . . . ." That memorandum appears as Appendix A to this opinion. We also incorporate, as Appendix B, a

31. Nixon v. Sampson, *supra* note 29, 389 F.Supp. at 160.

Subsequent to the hearing, on February 4, Judge Richey transmitted to us a report informing that on that date he had requested the Chief Judge of this circuit to convene a three-judge court to determine initially whether the challenge case should be heard and decided by such a court.[32] On the next day, the Chief Judge designated two judges to serve with Judge Richey as the court.[33] Thus the need for any further action on our part to activate the three-judge court machinery has disappeared. There remains, however, the question, extensively debated by the litigants, as to whether the stay should be continued; this question is explicitly presented by motions of some of the parties to vacate our stay.

II

[1] Manifestly, Judge Richey was obligated to abide any decision we might render on the petition for mandamus. "[A] lower court is bound to respect the mandate of an appellate tribunal;"[34] it "is without power to do anything which is contrary to either the letter or spirit

memorandum prepared by our First Deputy Clerk on January 31, listing, with time notations, relevant events through that date, from which we have deleted references to decisional action by this court not material to the problem involved in this case.

32. See 28 U.S.C. § 2284(1) (1970).

33. See *id.*

34. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 140, 60 S.Ct. 437, 440, 84 L.Ed. 656, 660 (1940). *See also* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168, 59 S.Ct. 777, 780–781, 83 L.Ed. 1184, 1188 (1939); Durant v. Essex Co., 101 U.S. 555, 556–557, 25 L.Ed. 961, 962 (1879).

of the mandate construed in the light of the opinion of [the] court deciding the case."[35] That we did not issue a writ of mandamus is beside the point. Our opinion set forth our views, the courses we held indicated, and why we deemed a writ unnecessary. Our order stated explicitly that the writ was denied "for the reasons and on the conditions stated in the" opinion.[36] The opinion as well as the order comprised our mandate,[37] and the opinion was to be consulted to ascertain what was required of Judge Richey.[38]

We cannot accept Judge Richey's explanation of his action[39] as ground for deviation from these well-settled principles. Disavowing the notion that he acted hastily to circumvent an adverse directive from this court,[40] he says in es-

35. Yablonski v. UMW, 147 U.S.App.D.C. 193, 195, 454 F.2d 1036, 1038 (1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972), quoting Thornton v. Carter, 109 F.2d 316, 320 (8th Cir. 1940).

36. See text *supra* at notes 25–28.

37. See Fed.R.App.P. 41(a).

38. *See* Gulf Ref. Co. v. United States, 269 U.S. 125, 135, 46 S.Ct. 52, 53, 70 L.Ed. 195, 198 (1925); FTC v. Standard Educ. Soc'y, 148 F.2d 931, 932 (2d Cir. 1945); Ohio Oil Co. v. Thompson, 120 F.2d 831, 836 (8th Cir.), cert. denied, 314 U.S. 658, 62 S.Ct. 112, 86 L.Ed.2d 528 (1941).

39. App. A.

40. App. A at 449, 450, 451.

sence that having twice previously stated that he would complete the opinion by January 31,[41] he felt it imperative to do so.[42] That, he tells us, was why work on the opinion continued beyond 2:00 a. m. on that morning, and why the opinion was signed and filed in the District Court's clerk's office at that early hour for reproduction.[43] He adds that the opinion was publicly released at 11:00 a. m., notwithstanding knowledge of our opinion and order, because he "had *already acted* in the consolidated cases as promised."[44]

We note a significant variation between Judge Richey's statement and our First Deputy Clerk's careful record of the relevant facts, logged to the minute.[45] That variation is an omission in Judge Richey's version. While he states that he received our order in his chambers "[s]ome time after 10:00 a. m."[46] he neglects to mention that at precisely 9:50 a. m. he was telephonically advised that our order and opinion had been entered by the First Deputy Clerk, who read the order to him twice, emphasizing that a writ of mandamus had been denied only **"for the reasons and on the conditions stated in [the] attached"** opin-

41. In his letter to counsel, see text *supra* at note 13, and in his response to the petition for mandamus. App. A at 449–450.
42. App. A at 450.
43. App. A at 450.
44. App. A at 451 (emphasis in original).
45. App. B.
46. App. A at 451. But see App. B at 454–455.

ion.[47] The order and opinion were hand-delivered to Judge Richey's chambers between 9:45 a. m. and 9:55 a. m.,[48] and we see from Judge Richey's own statement that calls advising counsel of his ruling were not made until after 10:00 a. m.[49]

We note also the absence of any positive suggestion that Judge Richey's opinion had been entered on the civil docket when our opinion and order were received.[50] When his courtroom clerk was asked at what time the opinion was filed, she said "11:00 a. m."[51] It was two hours afterwards that she called our First Deputy Clerk to say that the opinion had been "filed" in the wee hours of the morning although not released until 11:00 a. m.[52] But irrespective of docketing, we deem the predawn "filing" of Judge Richey's opinion to be of no conceivable legal or practical effect. It is perfectly clear from his own statement that he had control of the opinion at 11:00 a. m., and that counsel were not notified of it until after Judge Richey had been verbally informed of our opin-

47. App. B at 454.
48. App. B at 454–455.
49. App. A at 451.
50. Fed.R.Civ.P. 79(a).
51. App. B at 455.
52. App. B at 455.

ion and order and had a copy of both in his hands.[53] It was his plain duty to abide that decision, and nothing in his statement provides good cause for not so doing.

[2] From January 28, when Judge Richey was served with a copy of the petition for mandamus, he knew that petitioner sought from this court a writ commanding, *inter alia*, priority of decision for the challenge case over the consolidated cases. From the fact that, on January 29, we called for responses to the petition on the very next day, he knew that we would not deny the petition out of hand,[54] and that we were proceeding speedily toward action on it. We think it clear that a judge is under a duty not to so circumstance himself as to be unable to conform to directives of a higher court which, from plain appearances, might be imminent. Irrespective of motivation, the course Judge Richey followed after learning of the mandamus proceeding[55] seems to have totally ignored that possibility.

53. App. A at 451. See also App. B. at 455.

54. See Fed.R.App.P. 21(b).

55. See text *supra* at notes 42–49.

[3] Even more fundamentally, priority in the filing-time as between Judge Richey's opinion and our order is unimportant to our decision, for in either event we have the responsibility of protecting affected litigants from possible harm. To insure justice for the litigants is invariably our overriding concern. The difficulty germinated by Judge Richey's action must now be brought under control and that may be undertaken within the framework of the present proceeding. "[M]andamus lies to rectify a deviation"[56] or "to correct a misconception of the scope and effect of the appellate decision."[57] To that task we now proceed, first defining the problem in terms of relevant statutory provisions.

[4] Congress has ordained that an action seeking an injunction against the enforcement of its legislation on grounds of federal unconstitutionality be heard and determined by a district court comprised of three judges.[58] Congress has also specified that "[o]n the filing of the application" for injunction, the district judge to whom it is presented "shall immediately notify the chief judge of the circuit"[59] and, further, that an application for a preliminary injunction in such

56. Yablonski v. UMW, *supra* note 35, 147 U.S. App.D.C. at 195, 454 F.2d at 1038. *See also* Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305, 310 (1967); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566, 1572 (1945).

57. Yablonski v. UMW, *supra* note 35, 147 U.S. App.D.C. at 195, 454 F.2d at 1038, *See also* United States v. Haley, 371 U.S. 18, 19, 83 S.Ct.

58. 28 U.S.C. § 2282 (1970).

59. 28 U.S.C. § 2284(1) (1970).

an action—as petitioner sought here—"shall be given precedence and assigned for a hearing at the earliest practicable day."[60] We have previously held that in instances where a three-judge court is in order, the single judge must activate the three-judge machinery, and that any stay of three-judge proceedings which is proper may be granted only by the three judges.[61]

In our earlier opinion, we expressly refrained, as we do now, from deciding whether these particular provisions apply to the challenge case.[62] But in addition to these provisions, there is Section 105(a) of the Presidential Recordings and Materials Preservation Act,[63] which has evident bearing. As we stated in our earlier opinion,

> Section 105(a) of the Act confers upon the District Court for the District of Columbia "exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title,"[64] and

11, 9 L.Ed.2d 1, 2 (1962); In re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414, 416 (1895).

60. 28 U.S.C. § 2284(4) (1970).

61. Svejkovsky v. Tamm, *supra* note 28, 117 U.S.App.D.C. at 115, 326 F.2d at 658.

62. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. —, 513 F.2d at 430.

63. See note 18, *supra*.

64. See note 18, *supra*.

> specifically provides that "[a]ny such challenge shall be treated by the court as a matter requiring *immediate* consideration and resolution . . . ."[65] . . . It is clear that the case for which petitioner sought the three-judge court was a "challenge to the legal or constitutional validity of" the Act. It is equally clear that, as an integral part of his "challenge," petitioner's application for such a court was "a matter requiring immediate consideration and resolution . . ."[66]

And we further stated:

> Section 105(a) of the Act distinguishes the treatment to be given "challenges to the legal or constitutional validity of this title,"[67] on the one hand, and "any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in [the Act] or involving payment of any just compensation which may be due in connection therewith."[68] The sec-

65. See note 18, *supra*.

66. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 429.

67. See note 18, *supra*.

68. See note 18, *supra*.

tion then specifies, not only that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution," [69] . . . but also that "such challenge shall have priority on the docket of such court over other cases." [70] We have said that the case wherein petitioner seeks a three-judge court was a "challenge" within the contemplation of Section 105(a). We now add that as such it was entitled to priority over the consolidated cases—"other cases" because plainly "action(s) . . . involving the question of title, ownership, custody, possession, or control of" materials embraced within the Act.[71]

[5–7] In that opinion, we also took pains to alert Judge Richey to the peril of disposing of the consolidated cases ahead of the challenge case,[72] and to identify the nature of the peril.[73] Our reference obviously was to the doctrine of collateral estoppel,[74] which might bar petitioner from urging in the challenge case positions contrary to determinations which any decision of the consolidated

69. See note 18, *supra*.

70. See note 18, *supra*.

71. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 429–430.

72. See text *supra* at notes 22–24.

73. See note 22, *supra*.

74. See generally 1B J. Moore, Federal Practice ¶¶ 0.441 et seq. (1974).

cases might yield.[75] We reiterate that petitioner and his adversary in the challenge case were also parties to the consolidated cases, and that the issues of ownership and privilege in regard to the presidential materials were common to each. Adjudication of those issues in the consolidated cases, then, might foreclose antagonistic theories of ownership and privilege as bases for contentions in the challenge case.

75. Under the doctrine of collateral estoppel, a final judgment in a prior suit precludes relitigation of material issues decided therein. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122, 1127 (1955); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 91, 74 S.Ct. 414, 416, 98 L.Ed. 532, 537 (1954); Southern Pac. R. R. v. United States, 168 U.S. 1, 48–49, 18 S.Ct. 18, 27, 42 L.Ed. 355, 377 (1897). The federal rule is that pendency of an appeal does not suspend the operation of a final judgment for purposes of collateral estoppel, except where appellate review constitutes a trial de novo. Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 188–189, 61 S.Ct. 513, 515, 85 L.Ed. 725, 729 (1941); Reed v. Allen, 286 U.S. 191, 199, 52 S.Ct. 532, 533, 76 L.Ed. 1054, 1057 (1932); 1B J. Moore, Federal Practice ¶ 0.416[3], at 2252 (1974). The majority of the states follow the same rule. *See* Denham v. Shellman Grain Elevator, Inc., 444 F.2d 1376, 1380 (5th Cir. 1971); Overseas Motors, Inc. v. Import Motors, Ltd., 375 F.Supp. 499, 517 (E.D.Mich.1974); J. Moore, *supra*, at 2254. The prior judgment will support a claim of collateral estoppel even where it has been stayed pending appeal. Huron Holding Corp. v. Lincoln Mine Operating Co., *supra*, 312 U.S. at 189, 61 S.Ct. at 515, 85 L.Ed. at 729; J. Moore, *supra*, at 2252–53.

What we feared came to pass. Judge Richey's decision in the consolidated cases rejects petitioner's premises on ownership and privilege.[76] If ordered into effect, petitioner says, the decision will prevent him from presenting to the three-judge court substantial arguments in support of his challenge to the constitutional validity of the Act, and for that reason he asks that the stay be continued. So it is that, on the stay matter, the question of priority as between the challenge case and the consolidated cases comes to the fore.

While, as noted,[77] in our previous opinion we discussed the facial indications of Section 105(a)'s priority provision, we felt that resolution of the priority issue was for the three-judge court,[78] and we now adhere to that view. Because, however, it is strenuously argued that the priority provision does not justify any further stay, we have reexamined the provision in light of its legislative history to ascertain how strong the possibility is

76. Nixon v. Sampson, *supra* note 29, 389 F.Supp. at 133–145, 147–153.

77. See text *supra* at note 18.

78. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d 429–430.

that the priority provision means just what it appears to say.[79] We turn now to the results of that reinvestigation.

III

The history of the Presidential Recordings and Materials Preservation Act portrays vividly the congressional view that legislation as to the presidential materials was needed importantly and urgently, and, as well, that questions as to the validity of such legislation should be considered and resolved by the courts expeditiously. On September 8, 1974, President Ford announced that petitioner and the Administrator of General Services had negotiated and executed an agreement—the "Nixon-Sampson agreement"—conferring control of the materials upon petitioner.[80] Both Houses of Congress were concerned about the potential consequences of that agreement in terms of continuing availability of and

79. Our function in this regard approximates the function leading to an estimate of the probability of success on the merits when a litigant moves for a stay pending appeal. Here we undertake only to gauge probabilities, leaving the ultimate decision where it properly belongs.

80. See S.Rep.No. 93–1181, 93d Cong., 2d Sess. 3–4 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 3 (1974).

access to the presidential materials.[81]

81. The Senate Committee on Government Operations explained:

> The net effect of [the] provisions [of the Nixon-Sampson agreement] is to place the tape recordings in imminent danger of destruction. In the event of Mr. Nixon's death, all the tapes would have to be destroyed. The agreement also requires the Office of Special Watergate Prosecution Force, as well as any other litigant, to file with Mr. Nixon any request for access to the tapes and other materials. This, in turn, raises the strong possibility that the prosecution of the Watergate crimes could be marked by protracted delays in obtaining evidence, since it is quite possible that Mr. Nixon might resist some or perhaps all of that Office's requests for information. Moreover, the agreement suggests that Mr. Nixon, or his designees, could start destroying all the papers and materials (other than the tapes) by 1977.
>
> The ultimate destruction of the tapes, coupled with the difficulties in obtaining access to the other Nixon materials, would be a fundamental violation of public policy. To begin with, prosecutors, defendants, and the courts probably would be deprived of crucial evidence bearing on the defendants' innocence or guilt of the Watergate crimes for which they stand accused. Moreover, the American people would be denied full access to all facts about the Watergate affair, and the efforts of Congress, the executive branch, and others to take measures to prevent a recurrence of the Watergate affair may be inhibited. The Nixon-Sampson agreement, then, bears not only on our system of justice; it also bears on the viability of our constitutional system of government.

S.Rep.No. 93–1181, 93d Cong., 2d Sess. 4 (1974).

The House Committee on House Administration had this to say:

> . . . the agreement gives Mr. Nixon total control over all the materials and records of his Administration. It allows him to have access to the materials but excludes others from reviewing these records. By allowing Mr. Nixon to destroy all of the materials, the agreement ignores the public interest in preserving them. It ignores the legitimate continuing need for these materials in many judicial proceedings, including some in which U. S. law enforcement will be frustrated and individual rights impaired if the materials are unavailable to the courts. It ignores the needs of Congress and executive agencies for continued use of the documents in the process of government. And it ignores the needs of historians, political scientists, and other scholars for the information these materials contain on the events of recent years and the workings of our government.

H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 3 (1974).

In both Houses bills were promptly introduced, and they had as their purpose alteration of the Nixon-Sampson arrangement to invest the Federal Government with control over the materials, and thereby with power to protect them and provide for access. The Senate bill, introduced on September 18,[82] critical features of which we later discuss,[83] passed that body on October 4[84] and, with minor variations, the House on December 3.[85] Following amendments by the Conference Committee,[86] both Houses, on December 9, enacted the measure into law.[87] Thus Congress achieved the goal of expediting passage of legislation on the matter of the presidential materials.

82. 120 Cong.Rec. S 16870 (daily ed. Sept. 18, 1974).

83. See text *infra* at notes 88–92.

84. 120 Cong.Rec. S 18336 (daily ed. Oct. 4, 1974).

85. 120 Cong.Rec. H 11212 (daily ed. Dec. 3, 1974).

86. 120 Cong.Rec. H 11442 (daily ed. Dec. 9, 1974).

87. 120 Cong.Rec. S 20809, H 11445 (daily ed. Dec. 9, 1974).

The second congressional goal—speedy determination of possible challenges to the validity of the Act—was initially approached by insertion of an express provision on that subject in the Senate bill. In the form in which it first passed both Houses, the bill specifically provided that:

> The Federal District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of any provision of this Act or of any regulation issued under the authority granted by this Act. Such challenge shall be heard by a three-judge court constituted under the procedures delineated in section 2284, title 28 of the United States Code, with the right of direct appeal to the United States Supreme Court. Any such challenge shall be treated by the three-judge court and the Supreme Court as a priority matter requiring immediate consideration and resolution.[88]

When the Senate first considered the measure, Senator Ervin, one of its sponsors, commented that

> [t]his legislation, of course, may be subject to legal or constitutional challenges. In light of this possibility, the final principal provision states that all such challenges shall be heard on an expedited basis by a three-judge court, with direct appeal to the Supreme Court. In this way, all legal and constitutional issues can be resolved quickly.[89]

Senator Javits, another sponsor, stated that the bill

> vests in the U.S. District Court for the District of Columbia exclusive jurisdiction to hear challenges to the legal or constitutional validity of any provision of this act. It provides further that such challenges shall be heard by a three-judge court, with the right of appeal to the U.S. Supreme Court, and requires that such challenges be treated by both courts as priority matters to be given immediate consideration and resolution.[90]

And Senator Nelson, still another sponsor, pointed out that

> [t]his bill provides an expedited procedure to test any question of the invasion of anybody's rights. . . . It requires a three-judge circuit [*sic*] court to have the matter treated as a priority issue, and then appeal to the Supreme Court.[91]

88. 120 Cong.Rec. S 18234 (daily ed. Oct. 3, 1974).

89. 120 Cong.Rec. S 18236 (daily ed. Oct. 3, 1974).

90. 120 Cong.Rec. S 18239 (daily ed. Oct. 3, 1974).

91. 120 Cong.Rec. S 18327 (daily ed. Oct. 4, 1974).

Similarly, in the House, Representative Brademas, the floor manager of the bill in that body, explained to his colleagues that

> [t]o insure expeditious resolution of any challenge to the legal or constitutional validity of any provision of this title, the bill provides that any such challenge shall be heard by a three-judge panel of the U.S. District Court for the District of Columbia with a direct appeal to the U.S. Supreme Court. The bill further provides that any challenge and appeal shall be heard as a priority matter.[92]

Another manifestation of how urgent Congress deemed the enactment of legislation to deal with the presidential papers is found in the statutory scheme itself. Throughout the reports and debates on the bills which eventuated into the Act, Congress repeatedly made it plain that it considered the question of ownership of the materials to be a subject for judicial decision rather than legislation.[93] It believed, however, that the situation demanded legislation *immediately*, without awaiting judicial determination of the question of ownership,[94] and further believed that legislation could appropriately be framed to meet the emergency the Nixon-Sampson

92. 120 Cong.Rec. H 11208 (daily ed. Dec. 3, 1974).

93. See S.Rep.No. 93–1181, 93d Cong., 2d Sess. 3–5 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 4–5 (1974).

94. See S.Rep.No. 93–1181, 93d Cong., 2d Sess. 4–5 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 5 (1974).

agreement portended, without a resolution of that question, simply by making provision for the payment of just compensation for such materials as the courts might later determine was due.[95] As the report of the Committee on Government Operations elucidates:

> If the materials are public property, the Congress is merely exercising its powers under Article IV of the Constitution to dispose of public property.
>
> If the materials are private property, then the Congress is merely taking "protective custody" of them for critically important public business
>
> . . . .
>
> If a court should decide that the legislation would in any way deprive Mr. Nixon, or anyone else, of private property, provision is then made to have him paid just compensation for the loss of any such property right. The payment of such just compensation will render any "taking" under the legislation as constitutional.[96]

95. S.Rep.No. 93–1181, 93d Cong., 2d Sess. 3–4 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 5 (1974).

96. S.Rep.No. 93–1181, 93d Cong., 2d Sess. 5–6 (1974). See also, to the same effect, H.R.No. 93–1507, 93d Cong., 2d Sess. 7 (1974).

So it was that the Act, with relatively minor differences in text, passed both Houses of Congress.[97] It was only thereafter, but at some time prior to action by the Conference Committee on the differences between the Senate and House versions, that the pendency of the consolidated cases before Judge Richey assumed a role. In conference, the three-judge court requirement was eliminated, and the measure, with Section 105(a), in its present form,[98] was approved by the Committee[99] and subsequently accepted by both houses.[100] The only explanation for this action is found in remarks by

Representative Brademas when the action of the Conference Committee came on for consideration by the House. Representative Brademas explained:

97. 120 Cong.Rec. S 18336 (daily ed. Oct. 4, 1974); 120 Cong.Rec. H 11212 (daily ed. Dec. 3, 1974).

98. See note 18, *supra*.

99. See 120 Cong.Rec. H 11443 (daily ed. Dec. 9, 1974).

100. See 120 Cong.Rec. S 20809, H 11445 (daily ed. Dec. 9, 1974).

These amendments combine two sections in the House-passed measure—sections 103 and 106—to make clear that the U.S. District Court for the District of Columbia shall have exclusive jurisdiction to hear all challenges to this legislation, including challenges to the legal and constitutional validity of this title and any challenge regarding the question of title, custody, possession or control of these tapes and materials and the payment of "just compensation" which may be required. The amendment also deletes the provision for a three-judge court with direct appeal to the Supreme Court. This amendment would thereby enable a single judge of the U.S. District Court for the District of Columbia to hear any challenge to this legislation. The amendment provides that any challenges to this legislation receive priority consideration and that all appeals be heard on an expedited basis.

This amendment would allow for an expeditious review of any legal challenge to this legislation. There is now pending before a single-judge District Court for the District of Columbia a proceeding in which the major issues have already been briefed and argued and in which the major parties are present. Under the amendment, the pleadings in the pending litigation could be amended to take into account additional issues regarding the validity of the legislation and the United States could be added as a defendant to any claim for compensation by Mr. Nixon.

. . . The new "judicial review" section, section 105, would provide that any challenge to this legislation could be considered as part of litigation which is now pending in the U.S. District Court for the District of Columbia. Since most of the issues in this litigation have been fully briefed and competently argued, and since the issues in any challenge to this litigation will be essentially the same, the public interest will be fully represented. And, if it becomes apparent that a particular point may not be adequately represented, the judge presiding over such litigation could appoint an amicus curiae to argue these points.[101]

The remarks of Representative Brademas demonstrate that Congress intended to preserve single-judge jurisdiction over the consolidated cases, even for consideration and decision of challenges to the constitutional validity of the new Act in the event that such challenges were asserted in those cases. The remarks plainly contemplated, too, that any such challenge would utilize that opportunity. But Representative Brademas was completely silent on the question whether such a challenge could only take that route, and so is the rest of the legislative history.

101. 120 Cong.Rec. H 11444 (daily ed. Dec. 9, 1974).

We need not ponder whether Congress could validly have imposed the requirement that such a challenge could only be entertained in the consolidated cases. Nowhere in the legislative history is there any suggestion that Sections 2282 and 2284 would not enable a separate suit presenting a constitutional challenge to the Act in the context of a demand for injunctive relief. It would have been simple for Representative Brademas to state, and indeed for Congress to require, that those sections would not apply to challenges to the Act, had that been what Congress had in mind. Neither, however, was done, and the courts are left with the problem of determining whether petitioner's separate-suit challenge requires the usual three-judge court, particularly in light of the general canon of construction that repeal of a statute by implication is disfavored.[102]

102. Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334, 340 (1968); United States v. Zacks, 375 U.S. 59, 67-68, 84 S.Ct. 178, 183, 11 L.Ed.2d 128, 134 (1963); Silver v. New York Stock Exchange, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389, 400 (1963).

It is much the clearer, however, that Congress deemed indispensable to its objectives the immediate consideration and resolution of any challenge to the constitutional or legal validity of any provision of the new Act. It was to mandate that degree of expedition that each of the bills initially passing the Senate and the House contained the requirement that such challenges be heard and determined by a three-judge court, with direct appeal to the Supreme Court,[103] and contained also the requirement that both courts proceed immediately to consider and resolve the challenges.[104]

It was because, thereafter it came to the attention of Congress that the consolidated cases were pending before Judge Richey and, in the understanding of Congress, had proceeded to the point of briefing of many of the questions related to the validity of the Act, that the Conference Committee decided to leave it possible to utilize that litigation as the vehicle for speedy resolution of challenges to the validity of the Act[105] in-

103. See 120 Cong.Rec. S 18234 (daily ed. Oct. 3, 1974).

104. See 120 Cong.Rec. S 18234 (daily ed. Oct. 3, 1974).

105. See text *supra* at note 101.

stead of *requiring* a three-judge court. In sum, because of the progress Congress assumed the consolidated litigation had already made to that point, it was felt that expedition could be promoted if, in lieu of providing for a new suit before a three-judge court—which would have to start from a new beginning—the progress already achieved in the consolidated cases could be capitalized on.

But what Congress expected, and what Section 105(a) as enacted would permit, was that any and all challenges to the validity of the Act would be made in the consolidated cases before Judge Richey as a single judge, after appropriate amendments and additions of parties for that purpose were accomplished.

What Congress apparently did not anticipate was that petitioner, instead of pursuing that route, would institute a new, separate suit grounded on Sections 2282 and 2284 to test in orthodox fashion the constitutionality of the Act before a three-judge rather than a single-judge tribunal.

There is yet another important consideration and it indicates strongly that Congress intended that questions affecting the constitutional validity of the Act should be considered and completely resolved prior to any decision of other issues pertaining to the presidential materials. The Act, on its face, provides a comprehensive scheme for control, preservation and utilization of the presidential materials in the manner found to be best suited to the needs of the Federal Government and the American public.

It requires the Administrator of General services to "receive, obtain, or retain, complete possession and control of all original tape recordings of" designated conversations,[106] and "of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974."[107] It provides specifically that "[n]one of the tape recordings or other materials . . . shall be destroyed, except as" Congress may later provide;[108] that the materials are immediately available, on a priority basis, to the Special Watergate Prosecution Force for use in judicial proceedings;[109] that petitioner or his designee shall have access to the materials for purposes consistent with the Act, subsequent and subject to regulations the Administrator is required to promulgate;[110] and that agencies and departments in the Execu-

106. Presidential Recordings and Materials Preservation Act, § 101(a), 88 Stat. 1695 (1974).

107. *Id.* § 101(b)(1), 88 Stat. 1695 (1974).

108. *Id.* § 102(a), 88 Stat. 1696 (1974).

109. *Id.* § 102(b), 88 Stat. 1696 (1974).

110. *Id.* § 102(c), 88 Stat. 1696 (1974).

tive Branch shall have access to the materials subject to such regulations.[111] The Administrator is required to promulgate a set of regulations "as may be necessary to assure the protection of the" materials "from loss or destruction, and to prevent access to such" materials "by unauthorized persons,"[112] the regulations within ninety days after enactment to be submitted to both Houses of Congress and to become effective ninety legislative days following submission unless disapproved by a resolution adopted by either House during such period.[113] In promulgating the regulations, the Administrator is required to take into account a great variety of factors bearing on the relative needs of government, the public, litigants and petitioner to controlled access to the materials.[114]

111. *Id.* § 102(d), 88 Stat. 1696 (1974).

112. *Id.* § 103, 88 Stat. 1696 (1974).

113. *Id.* § 104(a), (b)(1), 88 Stat. 1696, 1697 (1974).

114. *Id.* § 104(a)(1)–(7), 88 Stat. 1696–97 (1974).

It is thus seen that Congress fashioned the Act to cover a wide territory. Once the Administrator has fashioned regulations which do not incur congressional disapproval the interests of all will be carefully and comprehensively regulated.[115] It must be noted, too, that the regulatory process is to continue indefinitely into the future, with revisions of regulations from time to time as may be needed.[116] If only the Act and the implementing regulations are valid, Congress will have settled questions about the materials on a very broad scale.

It may well be wondered how much, if anything, will be left unregulated by the Act and the regulations; in other words, what else, if anything, a court will have to pass upon, aside from disputes over access to the materials *under* the legislatively- and administratively-established criteria, and questions of just compensation for takings essential to enable gov-

115. The Act expressly leaves unaffected rights, limitations and exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (1970). Presidential Recordings and Materials Preservation Act, § 104(d), 88 Stat. 1698 (1974). This means, of course, that both statutes, together with the regulations, would supply the governing rule for all cases.

116. See Presidential Recordings and Materials Preservation Act, § 104(b)(3), 88 Stat. 1697 (1974).

ernmental retention and control.[117] In any event, to the extent that Congress and the Administrator of General Services validly define the rights and interests of those to whom the materials are subjects of concern, judicial decisions on those subjects might well be unnecessary and meaningless. All this would seem to suggest that what Congress contemplated, and what congressional specifications in Section 105 mean, is that questions of validity of the Act's provisions would be decided ahead of other questions.

This review of the Act's legislative history, we think, lends clarity to the priority features of Section 105(a). The essence of the legislative lesson may be briefly summarized. Section 105(a) sharply distinguishes between "challenges to the . . . constitutional validity of" Title I of the Act,[118] like petitioner's constitutional attack, and actions involving questions "of title, ownership, custody, possession, or control of" the presidential materials, like the consolidated cases.[119] Section 105(a) then proceeds to specify that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution"[120] and that "such

117. See note 115, *supra*.

118. See note 18, *supra*.

119. See note 18, *supra*.

120. See note 18, *supra*.

challenge shall have priority on the docket of such court over other cases." [121] As the text and legislative history, read together, make quite plain, what Congress wanted was speed in judicial handling of such "challenges," whether properly to be considered and determined by three judges or one.[122] Just as plainly, the text and history of Section 105(a) indicate that Congress did not share the same concern for speed in the resolution of litigation not amounting to a "challenge." That litigation is relegated to a position below the priority specified for "challenge" actions.

IV

Events subsequent to issuance of our stay order have mitigated somewhat the problem left in the wake of Judge Richey's released opinion in the consolidated cases. His call for a three-judge court and the designation of that court for petitioner's challenge case [123] have eliminated any pre-existing need for a stay pending consideration of those aspects of the litigation. There remains, however, the unsettled question of priority as between the challenge case and the consolidated cases. That is a matter retaining importance from the possible impact, upon presentation and treatment of constitutional contentions in the challenge case, of Judge Richey's determinations on ownership and privilege, in reference to the presidential materials, should they be ordered into operation.[124]

[8, 9] As we have stated, those determinations, once effective, may preclude petitioner from advocating in the challenge case any constitutional position hypothesizing ownership or privilege differently from Judge Richey's outcome on those scores.[125] By the same token, the three-judge court, convened to render a decision on the Act's constitutionality, might find itself unable to view the Act in light of conclusions on ownership and privilege variant from Judge Richey's, and conceivably unable to pass on the Act at all. We are mindful that the need for a three-judge court in the challenge case is still uncertain.[126] But it is

121. See note 18, *supra*.

122. See text *supra* this part.

123. See text *supra* at notes 32–33.

124. See Part II, *supra*. The priority question and the three-judge question are independent, and the question of priority remains whether a decision thereon is to be made by one judge or three. See text *supra* at notes 63–71.

125. See text *supra* at notes 73–76.

126. See text *supra* at notes 58–66.

clear enough that if that court is found to be jurisdictionally required, it must be indulged enough room to enable proper performance of the serious and difficult task of sound constitutional adjudication.[127] Three-judge business is for three judges, not just one,[128] and we cannot accept the notion that a single judge can unilaterally narrow the ambit

127. This is well illustrated by numerous holdings that, notwithstanding the factual conclusions of state courts, the Supreme Court on review has the duty of independently examining the facts and determining whether federal rights at stake have been violated. *See, e. g.*, Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6, 13 (1970); Whitus v. Georgia, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599, 603 (1967); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121, 74 S.Ct. 403, 410, 98 L.Ed. 546, 556 (1954); Niemotko v. Maryland, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267, 270 (1951).

128. Compare Svejkovsky v. Tamm, *supra* note 28, where we found error in the action of the district judge who, instead of promptly deciding whether to call for convocation of a three-judge court, stayed proceedings in the case pending decision by the Supreme Court of another case involving the same or similar issues. We said that "[i]f such a stay is deemed proper here, under § 2284 it should, in any event, be granted by the court of three judges, and not by the single judge who is required to initiate the three-judge proceedings." 117 U.S. App.D.C. at 115, 326 F.2d at 658.

of a three-judge tribunal.[129] We think,

129. It is argued that Judge Richey, as a single judge, could properly decide whether resolution of the consolidated cases should be deferred pending the outcome of the challenge case. The cases relied upon do not support that proposition. In Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), the Court upheld the authority of a single judge to pass on a question of conflict between the state law under challenge and federal law before requesting a three-judge court. In Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974), the Court noted that a single judge could dismiss a constitutional challenge for lack of standing without asking for a three-judge court, despite the fact that such a court would otherwise be required. 419 U.S. at 99, 95 S.Ct. at 295, 42 L.Ed.2d at 258. *See also* Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1972). In these cases, the single judge did no more than the three-judge court would itself have been required to do—dispose of the litigation on non-constitutional grounds, if possible. In each, the ground for decision was "a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." Gonzalez v. Automatic Employees Credit Union, *supra*, 95 S.Ct. at 295 (footnote omitted). Here, decision of the consolidated cases hardly had the capability of obviating the need for a three-judge decision on petitioner's challenge to the constitutionality of the Act. Moreover, while single-judge rulings on issues that might obviate the need for a three-judge court obviously promotes conservation of judicial resources, in the instant case Judge Richey apparently entertained no such purpose. If any resolution of the consolidated cases could conceivably have removed the necessity for convening a three-judge court, it was the resolution that Judge Richey fashioned in his opinion of January 31. Nevertheless, on February 5, Judge Richey requested the Chief Judge of the circuit to convene a three-judge court to determine whether

rather, that it is for the three-judge court to define its area of proper concern in the challenge case, and to ascertain for itself whether Judge Richey's action amounted to a preemption of its prerogatives, particularly under the priority specification of the Act.[130]

Had the three-judge court been convened promptly after the filing of the challenge case, it could have avoided the dilemma now confronting it. It could have adjudicated the priority question and, if its ruling favored priority for the challenge action, it could have enjoined the parties to the consolidated cases from proceeding further toward a decision on the merits.[131] But with the consolidated cases decided and lacking only an implementing order when the three-judge court came into being, there appears to be no method whereby that court might now implement any conclusion it might reach that the challenge case has priority.[132] Rather, the choice, as we see it, is between a stay of any order effectuating Judge Richey's decision in the consolidated cases until the

a three-judge court was required to hear the challenge to the Act. See text *supra* at note 13.

130. See note 18, *supra*, and Part II, *supra*.

131. Speed Prods. Co. v. Tinnerman Prods., Inc., 83 U.S.App.D.C. 243, 245–246, 171 F.2d 727, 729–730, (1948); Small v. Wageman, 291 F.2d 734, 735 (1st Cir. 1961); Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F.2d 1012, 1014 (2d Cir. 1944). Restraint of the parties is not tantamount to restraint of the court. Steelman v. All Continent Corp., 301 U.S. 278, 290–291, 57 S.Ct. 705, 710, 81 L.Ed. 1085, 1093 (1937).

132. See text *supra* at notes 73–76.

three-judge court can decide the priority question and proceed accordingly, on the one hand, and relegating that question to an appeal from Judge Richey's decision, to be made possible by dissolution of the stay and entry of an order on the opinion.[133] The choice is thus thrust upon us, and the question is which of the two courses open to us is best calculated to serve the interests of the litigants and the litigations. We settle upon the stay route in lieu of the appeal route.

[10] The route by an appeal in the consolidated cases—with adjudication of the priority issues before examination of the merits, to speed resolution—has some attractions. We do not lightly stay judicial decisions which may in the long run turn out to be correct. Our stay will retard, for a while, the progress of an appeal from the decision in the consolidated cases. Additionally, the three-judge apparatus is not to be utilized freely, but only and strictly as Congress

133. The most desirable alternative would be referral of the stay question to the three-judge court. Since, however, an order acting only on the parties, see note 131, *supra*, could not delay an order on Judge Richey's opinion, and consequently could not prevent any collateral effect of the ownership-privilege determinations, it appears that the three-judge court no longer possesses the means of safeguarding the decisional realm to which it may be entitled.

has prescribed.[134] These considerations have been carefully weighed as we have deliberated on the two alternatives open to us.

In support of continuation of the stay, petitioner has suggested that its dissolution would greatly diminish his chances of reversing determinations adverse to his assertions of ownership of the presidential materials and privilege to shield them from outside scrutiny. Should the stay be lifted, petitioner's avenue for review of Judge Richey's conclusions on those issues would, of course, be the normal appeal of right to this court and, if necessary, an application to the Supreme Court for a writ of certiorari, the granting of which is discretionary. The suggestion is that with the stay viable and the three-judge court thus free to decide the ownership and privilege claims for itself, petitioner could appeal, as a matter of right, directly to the Supreme Court if the three-judge court rejected

134. *E. g.*, Mitchell v. Donovan, 398 U.S. 427, 431, 90 S.Ct. 1763, 1765, 26 L.Ed.2d 378, 382 (1970); Goldstein v. Cox, 396 U.S. 471, 478, 90 S.Ct. 671, 675, 24 L.Ed.2d 663, 669 (1970).

them.[135] We note, however, that petitioner could gain this supposed benefit only if the three-judge court denies a preliminary injunction, or by final order a permanent injunction, against enforcement of the Act;[136] should the court decide that the challenge action is not one requiring three judges,[137] or should it decide that the Act is unconstitutional but an injunction is unnecessary,[138] appellate review must begin in this court. And if, on a point short of federal constitutionality, injunctive relief should be refused, it is debatable whether a direct appeal to the Supreme Court would offer any advantage over the appellate path through this court.[139] Moreover, even aside from these possibilities, which we are in no position to gauge, there is the question whether in any event the supposed benefit for which petitioner strives is sufficient reason to warrant continuation of the stay.

135. Pursuant to 28 U.S.C. § 1253 (1970), it is assumed.

136. *See* Rockefeller v. Catholic Medical Center, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970); Goldstein v. Cox, *supra* note 134, 396 U.S. at 475, 90 S.Ct. at 674, 24 L.Ed.2d at 667–668; 9 J. Moore, Federal Practice ¶ 110.03[3], at 79–80 (1973).

137. Mengelkoch v. Industrial Welfare Comm'n, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2d 215 (1968); Wilson v. Port Lavaca, 391 U.S. 352, 88 S.Ct. 1502, 20 L.Ed.2d 636 (1968); 9 J. Moore, Federal Practice ¶ 110.03[3], at 76–77 (1973).

138. *See* Mitchell v. Donovan, *supra* note 134, 398 U.S. at 430–431, 90 S.Ct. at 1765, 26 L.Ed.2d at 381–382; Rockefeller v. Catholic Medical Center, *supra* note 136; 9 J. Moore, Federal Practice ¶ 110.03[3], at 77–80 (1973).

139. In Gonzalez v. Automatic Employees Credit Union, *supra* note 129, the Court observed that "[w]hile issues short of the merits—such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention—are often

[11] We need not ponder further this suggestion or the factors favoring the appeal route over the stay route, for another factor dictates our conclusion. The stark truth of the matter is that either method could retard one of the two litigations—the consolidated cases surely by a stay, or the challenge case perhaps by collateral estoppel—and in this milieu we find guidance in what Congress has said and done. We have adverted to the provisions explicitly requiring "immediate consideration and resolution" of any challenge to Title I of the Act,[140] and "priority [of such challenge] on the docket of the [District] [C]ourt over other cases."[141] We have meticulously explored the Act's legislative history,[142] and there have seen the consummated effort to speedily enact this legislation,[143] and the congressional intent that challenges

of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal," 419 U.S. at 99, 95 S.Ct. at 295, 42 L.Ed.2d at 258, and that "the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeals in summary fashion." *Id.* The Court added that it "typically disposes summarily of between ⅔ and ¾ of the three-judge court appeals filed each term," 419 U.S. at 99 n.17, 95 S.Ct. at 295 n.17, 42 L.Ed.2d at 256 n.17, and that "[i]t seems more than probable that many of these cases, while unworthy of plenary consideration here, would benefit from the normal appellate review available to single-judge cases in the courts of appeals." *Id.*

140. See text *supra* at notes 63–66.

141. See text *supra* at notes 67–71.

142. See Part III, *supra*.

143. See text *supra* at notes 80–87.

to its validity proceed through the courts with all possible expedition.[144] Utilization of the appeal route, as the means of dealing with Judge Richey's decisions on ownership and privilege in regard to the presidential materials, would delay consideration by the three-judge court of the full panoply of considerations affecting the constitutionality of the Act; it could, in practical effect, halt the work of the three-judge court until completion of appellate review of the consolidated cases in this court, and possibly in the Supreme Court. On the other hand, continuation of the stay would enable the three-judge court to proceed immediately to the priority issue without the limitations which Judge Richey's determinations may impose. In sum, only the stay route can preserve the possibility of "immediate consideration and resolution" of the challenge case on a basis of "priority . . . over other cases," while the appeal route would stand congressional purpose on its head. When this factor is placed on the scale, the balance clearly favors a continued stay.

Our stay is, of course, for the protection of the three-judge court, a protection it seemingly is unable to erect for itself. It is designed to place the parties in approximately the same positions they

144. See Part III, *supra*.

would have occupied had the three-judge and priority questions been given the early attention they deserved. The stay will remain in effect for as long, but only so long, as the three-judge court may need it. Now constituted, the court presumably will determine whether the challenge case is properly before a court of three judges and, if so, whether adjudication of that case should precede effectuation of Judge Richey's decision by entry of an order in the consolidated cases. Should the three-judge court answer either the three-judge question or the priority question in the negative, the occasion for the stay will end at that point, as it will whenever that court concludes on any other ground that the stay has served its purpose. Otherwise, the stay will endure until the three-judge court has rendered its decision on petitioner's constitutional challenge. Meanwhile, the court has but to make known its wishes in regard to the stay, and we will be prepared to honor them.

The motion for reconsideration of our earlier disposition of the mandamus petition is granted. The motions to vacate our stay are denied.[148] The stay will remain in effect until further direction by this court. An appropriate order will accompany this opinion.

148. In his motion asking this court to vacate our stay, the Special Prosecutor claims that his investigations will be hindered if the stay remains and prolongs the situation as it existed prior to release of Judge Richey's opinion because, he says, he lacks sufficiently broad access to the presidential materials. Petitioner's counsel represents, however, that petitioner "has not refused to provide the Special Prosecutor any specific item, including tape recordings, which the Special Prosecutor has requested." Moreover, while undoubtedly our stay provides narrower access than the Special Prosecutor sought in the consolidated cases, the procedural differences between the arrangement prior to the stay and the scheme outlined in Judge Richey's opinion are less significant. Accordingly, we see no need to vacate our stay on the ground the Special Prosecutor urges. In any event, we would approve, on an interim basis, an interlocutory modification of Judge Richey's restraining order, which he might desire to make, to permit any necessary access satisfactorily demonstrated to him by the Special Prosecutor—as distinguished from an order implementing Judge Richey's opinion or any further determination on the issues of ownership or privilege. In that event, the Special Prosecutor has our leave to apply to us for a further order excepting such a modifying order from the operation of our stay.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1063

RICHARD NIXON, PETITIONER

v.

HON. CHARLES R. RICHEY,
United States District Court
for the District of Columbia, RESPONDENT

SUPPLEMENTAL MEMORANDUM BY RESPONDENT

Respondent wishes to set the record straight with respect to the circumstances surrounding entry of its opinion in the consolidated cases (C.A. No. 74-1518, C.A. No. 74-1533, C.A. No. 74-1551) which are now the subject of a stay issued by the above court at about 5:00 p.m. on January 31, 1975. The questions asked by the Court of Appeals in this case at the time of oral argument and some of the pleadings herein indicate that some of the facts may have been subject to question by the parties. Respondent emphatically states that it did not act in anticipation of an adverse opinion or directive from the Court of Appeals. Any other conclusion has no basis in fact, and indeed is contradicted by the facts. Respondent herein feels compelled to give the Court of Appeals the benefit of the facts, some of which are solely within this Court's knowledge.

On two occasions prior to January 30, 1975, Respondent stated on the public record that its opinion in the consolidated cases would be completed by January 31, 1975. First, by letter of January 23, the Respondent informed counsel that the opinion would issue during the week of January 27. Second, in Respondent's "Memo-

APPENDIX A—Continued

randum by Respondent" filed in the mandamus suit at about 4:30 p.m. on January 30, this Court stated that the opinion should be released on the following day, January 31, 1975.

Having made these representations to this Court and the parties, Respondent felt that it was *imperative* to meet the deadline of Friday, January 31, 1975. These representations to the Court of Appeals and counsel were the *sole* source of the Respondent's action on Friday morning. In particular, Respondent *did not* act in anticipation of any ruling by the Court of Appeals in the mandamus suit. A Court of Appeals ruling simply did not appear to be imminent on Thursday, January 30, because the responses of parties were not due until 4:30 that afternoon. In fact, Respondent's response was filed on or about that time in the Office of the Clerk of the Court of Appeals.

In view, then, of the Respondent's representation to the Court of Appeals at or about 4:30 p.m. on Thursday, January 30, that Respondent's opinion "should be ready for release on Friday [January 31]," Respondent perceived that the proper course would be to work until any hour on Thursday evening until the job was complete. Not an insubstantial amount of work remained even as Respondent made that statement to the Court of Appeals. As declared in the statement, some 85 pages of the opinion were complete, some citations were still to be checked, and Respondent's secretary was still re-typing the final draft. Completion of a 98-page opinion is not a matter to be taken for granted. Therefore, Respondent's entire staff remained until the job was done: Respondent, its secretary, law clerks, and courtroom clerk.

Shortly after 2:00 a.m. on Friday, January 31, the opinion was completed. Respondent signed the opinion at that early morning hour and the deputy courtroom clerk filed the opinion in the Office of the Clerk of the United States District Court so that copying could be completed. Respondent, however, did not sign and file the judgment at that time.

The deputy courtroom clerk stayed after the rest of the staff had left the Courthouse in order to complete all

copies of the opinion for the attorneys and the public. Approximately 60 copies of the opinion were estimated for these purposes.

The Respondent and its staff returned to the Courthouse shortly before 9:00 a.m. on Friday, January 31. A synopsis of the opinion was prepared and the hour of approximately 11:00 a.m. was established as the time when *public* copies of the synopsis and opinion would be available, since that amount of time would be required to make copies of the synopsis. The deputy courtroom clerk, who had voluntarily stayed even later than the rest of the staff to copy the filed opinion, arrived after 10:00 a.m. Pursuant to earlier instructions of Respondent, she proceeded to call the numerous attorneys involved in the case to inform them that Respondent had ruled and that copies of the opinion would be available at about 11:00. Some time after 10:00 a.m.. Respondent received in chambers an order of the Court of Appeals denying the petition for a writ of mandamus and the accompanying *per curiam* opinion. The Respondent immediately read and discussed that opinion with its law clerks.

Respondent found in the *per curiam* opinion that in denying the petition for writ of mandamus the Court of Appeals suggested how Respondent should proceed. The procedure outlined was that Respondent should decide the three-judge court question *prior* to ruling in the consolidated cases even though the writ of mandamus was denied. Respondent was perplexed, needless to say. The suggested course of action was *impossible* to follow at that time because Respondent had *already acted* in the consolidated cases as promised. In view of the events as they had occurred, Respondent could not retract the opinion. However, the Respondent never filed a judgment in the case.

The inescapable conclusion from the facts as set forth herein is that Respondent effectuated its opinion in the consolidated cases, neither in violation of an order of the Court of Appeals, nor in contravention of an opinion of the Court of Appeals, nor in anticipation of an adverse decision of the Court of Appeals. Further, the Court of

Appeals' *per curiam* opinion attached to its order denying the petition for a writ of mandamus suggesting procedure in the district court was not filed until at least seven hours after Respondent had acted.

Respondent, or any member of the district court, would never act in violation of an order or opinion of this Court of Appeals, or the Supreme Court of the United States.

In addition to the foregoing, it should be noted that within three business days (February 5, 1975) following receipt of the Court of Appeals' *per curiam* opinion, this Respondent requested the convening of a three-judge court and two other judges were designated on that same day.

Respectfully submitted,

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX B

January 31, 1975

MEMORANDUM

TO JUDGES: Robinson
Wilkey

RE: *Nixon v. Richey*, No. 75-1063
Petition for Mandamus

FROM: Daniel M. Cathey

This memorandum is being submitted at your request.

To the best of my recollection the following events and conversations occurred in connection with the petition for writ of mandamus filed the afternoon of January 28, 1975. The times reflected below are approximate unless marked with an asterisk—these are times when I looked at the clock in my office and made a note of it.

January 28, 1975

4:00 P.M. Petition for Writ of Mandamus referred to Court Law Clerk.

*4:20 P.M. I called counsel for petitioner to inquire if Judge Richey had already ruled and if not when was counsel advised he may rule. Counsel referred to Judge Richey's letter and said he did not know.

4:35 P.M. I tried to contact the Civil Docket Division of the Clerk's Office of the District Court. There was no response.

4:45 P.M. I called Judge Richey's Chambers—from my prior Courtroom Clerk experience I recalled that Courtroom Clerks do on occasion pick up orders from chambers. Judge Richey's law clerk put Judge Richey on the telephone and Judge Richey asked me what we had. I told him a petition for writ of mandamus was filed with this office. Judge Richey advised me that his order had not been filed but he intended to rule before the end of the week.

4:55 P.M. The Court Law Clerk told me she would take the matter up with the Presiding Judge of the division to find out if action should be taken that night since Judge Richey did not tell me exactly when he would rule.

5:10 P.M. The Court Law Clerk returned and said the matter would be taken up at the motions conference.

January 29, 1975

The Petition for Writ of Mandamus was taken up orally by the Court Law Clerk at the motions conference.

• • • •

3:15 P.M. My Secretary called all counsel and read the order directing that responses be filed to the Petition for Writ of Mandamus by 4:30 P.M. Thursday, January 30, 1975, and a copy was delivered to Judge Richey's Chambers.

• • • •

January 30, 1975

3:50 P.M. Judge Richey's Secretary called me and said Judge Richey would respond to the order.

4:00 P.M. A copy of the Government's response was hand delivered by Mr. Kline to Judge Richey's Chambers.

• • • •

*4:20 P.M. Judge Richey came to my office with his response to this Court's order. I told Judge Richey I expected something tonight, I was not sure, but in any event I would call him forthwith at his Chambers or his unlisted home telephone number which he had given me.

5:30 P.M. I called Judge Richey's Chambers and told his Secretary I was going home and gave her my home number.

January 31, 1975

• • • •

9:45 A.M. My Secretary called counsels' offices to advise of entry of the order. Mr. Bonner's Secretary went to deliver a copy of the order to Judge Richey's Chambers.

*9:50 A.M. Judge Richey called me and asked "what did the Court do, Dan?" I read the order on the Petition verbatim and told him a copy was being delivered now to his Chambers. He said, "then the case is closed?" I read the order again and emphasized "for the reasons and on the conditions stated in attached Per Curiam opinion." He said "O.K., I'll read that." He also said he was up until 3:00 A.M. working on his opinion.

*9:55 A.M. Mr. Bonner's Secretary returned to my office and said the order was delivered and

said before she left Judge Richey's Chambers she heard someone in the inner office say "Bring that in!"

11:15 A.M. One of the Court Law Clerk's told me Judge Richey had ruled.

11:20 A.M. I called Judge Richey's Courtroom Clerk and asked what time the order was filed. She said 11:00 A.M.

*1:27 P.M. Judge Richey's Courtroom Clerk called me back and said the opinion was filed at 2:30 A.M. but for mechanical difficulties the order was not *released* until 11:00 A.M.

1:45 P.M. Judge Richey called me and asked if his Courtroom Clerk had called. I said yes and he said he wanted the facts to be straight and the correct information to my Court to be correct.

3:00 P.M. Counsel for Petitioner filed a motion for reconsideration.

* * * *

5:00 P.M. My office called counsel to notify them of the order staying the effectiveness of Judge Richey's opinion and any orders and a copy was delivered to Judge Richey's Chambers.